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In the

Supreme Court of the United States

OCTOBER TERM, 1982

TRUDY UNGER,

Petitioner,

vs.

CONSOLIDATED FOODS CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Petitioner seeks review of the Decision of the Court of Appeals for the Seventh Circuit entered November 26, 1982, *Unger* v. *Consolidated Foods Corp.,* 693 F.2d 703 (7th Cir. 1982), on the remand from this Court of June 1, 1982. 73 L.Ed.2d 1297, 102 S.Ct. 2288. Petitioner, as plaintiff, had prevailed in her Title VII action for sex discrimination both at the trial in the District Court for the Northern District of Illinois by judgment order entered December 4, 1980 and on defendant's appeal from that judgment by the opinion of the Court of Appeals for the Seventh Circuit of August 14, 1981, *Unger* v. *Consolidated Foods Corp.,* 657 F.2d 909 (7th Cir. 1981). Defendant filed a Petition for Writ of Certiorari to this Court and, while that petition was pending, this Court on May 17, 1982 entered its decision in *Kremer* v. *Chemical Construction Corp.,* 456 U.S. ....., 72 L.Ed 2d 262, 102 S.Ct. 1883 (1982). On June 1, 1982, this Court granted defendants' Petition for Writ of Certiorari, vacated the judgment and remanded the case to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *Kremer.* On November 26, 1982, the Court of Appeals for the Seventh Circuit held that its decision in *Unger* v. *Consolidated Foods Corporation,* 657 F.2d 909 (7th Cir. 1981) was controlled by *Kremer* and that *Kremer* must be applied retroactively. Accordingly, the order was entered remanding the case to the District Court with instructions to dismiss the Complaint. This Petition for Certiorari followed.

The following questions are presented for review:

1. Did the Court of Appeals erroneously apply the doctrine of *Kremer* retroactively, contrary to the decision in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971)?

2. Did the Court of Appeals erroneously hold that the decision of the Illinois State Court, on review from the Illinois Fair Employment Practices Commission, was a decision on the merits similar to the decision of the New York State Court in *Kremer*?

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No.

TRUDY UNGER,

Petitioner,

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CONSOLIDATED FOODS CORPORATION,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OFFICIAL REPORTS IN EARLIER PROCEEDINGS

The opinion of the Court of Appeals on the remand is reported as *Unger* v. *Consolidated Foods Corp.*, 693 F.2d 703 (7th Cir. 1982) and is reproduced in Appendix A. The opinion of the United States Supreme Court granting certiorari and remanding for consideration in the light of *Kremer* is reported at 73 L.Ed 2d 1297, 102 S.Ct. 2288 (1982) and is reproduced in Appendix B. The opinion of the Court of Appeals on Consolidated's appeal from the judgment of the District Court is reported at 657 F.2d 909 (7th Cir. 1981) and is reproduced in Appendix C. The Findings of Fact and Conclusions of Law and the Judgment Order of District Judge J. Sam Perry entered December 2, 1980 are unreported and

reproduced in Appendix D and E. The opinion and order of the District Judge Stanley J. Roszkowski, denying defendant's Motion for Summary Judgment is unreported and is reproduced in Appendix F.

GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED AND STATEMENT OF JURISDICTION OF DISTRICT COURT IN ORIGINAL ACTION

1. This court has jurisdiction to review the judgment by writ of certiorari based on 28 U.S.C. §1254(1).

2. The judgment sought to be reviewed was entered by the United States Court of Appeals for the Seventh Circuit on November 26, 1982.

3. The District Court had jurisdiction in the individual action of plaintiff for violation of the Title VII of the Civil Rights Act of 1964, 42 USC §2000e *et seq.*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are the Fifth Amendment of the United States Constitution and Title VII of the Civil Rights Act of 1964, §706 (in part) 42 U.S.C. §2000e-5(b) in part, (c) in part, (e), (f)(1) in part, (f)(3) in part. The constitutional and statutory provisions are reproduced in Appendix L.

STATEMENT OF THE CASE

Petitioner, Trudy Unger, is a woman who was discharged as a territorial sales representative for the sale of women's swimsuits for Sirena, a Division of Consolidated Foods Corporation. In her nine years with Sirena (including eight years with Sirena, Inc. prior to its acquisition by Consolidated Foods in 1971), she

was assigned the Midwest territory—comprising the states of Illinois, Indiana, Minnesota, Michigan, Wisconsin, and, from 1966 on, Ohio. In that nine-year period, she built the Midwest territory from annual sales of $20,000 to $572,000 and was paid on a commission basis of 7% of the net billing. In the same period, the total company sales increased from $383,241 to $3,578,826. Proportionally, Unger increased the sales in her territory by 27 times while the company increased its total sales only 10 times. Unger's share of the total business of the company during the same period increased from 3.6% to 8.36%. Unger was the only female sales representative of the 26 sales representatives employed by Sirena during the nine-year period. She was discharged as sales representative for the Midwest territory effective July 31, 1972 and replaced by a man. Findings of Fact, ¶s 1, 3, 7, 8, 9, 12, 14, Appendix (hereinafter "App.") E at E-2.

When petitioner Unger complained of the discharge to Arnold Seckler, the president of the division, he informed her that the discharge was due to a corporate reorganization and division of her territory, the Midwest territory, among three salesmen. Following the discharge from the Midwest territory, Seckler subsequently rehired Unger as sales representative for the Prairie territory. The Prairie territory comprised the states of Iowa, Nebraska, Kansas, Missouri, and Illinois, outside of Chicago. In August, Unger discovered that she had been replaced by a single man in the Midwest territory rather than by three salesmen. Findings of Fact, ¶s 9, 10, App. E at E-3. At the same time she also learned that the Prairie territory had a volume of business of only $130,000 in the preceding year, ap-

proximately one-half of what she had been told and less than one-quarter of the volume of the Midwest territory.

On October 2, 1972, within the Illinois statutory period, Unger filed a complaint with the Illinois Fair Employment Practices Commission ("FEPC") for discriminatory discharge on the basis of sex from her employment as sales representative for the Midwest territory in violation of the Illinois Fair Employment Practices Act. Ill.Rev.Stat., 1971, ch.48, §851 *et seq.* On Friday, October 13, 1972, the Sirena Division received notice of the filing. On that same day, Maurice "Corky" Newman, sales manager of Sirena, informed Unger of the company's receipt of notice of the proceeding and of its disapproval of Unger filing such a charge. On the following Monday, October 16, 1972, she was discharged from the Prairie territory. Unger then filed a second claim of retaliatory discharge with the FEPC. Findings of Fact, ¶s 24-29, App. E at E-8.

Unger also filed a timely claim of discrimination under Title VII with the Equal Employment Opportunity Commission ("EEOC"). Pursuant to the deferral provision of Title VII, Unger proceeded on her charges before the FEPC.

Thereafter, the proceedings took the following course:

1. The FEPC appointed a private lawyer, Daniel Shulman, to hear the case. Shulman prepared a report and recommended order finding no discrimination on the first discharge and retaliation on the second discharge. (App. H at H-16 to H-23).

2. The parties sought review by the FEPC. On February 20, 1975, the FEPC entered an order, solely on the record and without hearing evidence, finding no dis-

crimination on the first discharge and no retaliation on the second discharge. (App. I at I-20 to I-23)

3. On March 25, 1975, Unger filed a complaint with the Circuit Court of Cook County seeking review of the decision of the Commission under the Illinois Administrative Review Act. Ill.Rev.Stat., ch. 110, §264 et seq.

4. On September 14, 1976, the Circuit Court of Cook County reversed the Commission, finding its decision to be against the manifest weight of the evidence both on the issues of discrimination and retaliation. (Order of Judge Berg, App. J) This determination was based solely on the record of the hearing officer without hearing evidence. Consolidated appealed that order to the Illinois Appellate Court for the First District. While the appeal was pending, the EEOC issued its right to sue letter and, on February 2, 1977, Unger filed her Title VII action in the United States District Court for the Northern District of Illinois.

5. On May 24, 1978, the Illinois Appellate Court reversed the Circuit Court and reinstated the decision of the Commission. *Unger* v. *Sirena Division of Consolidated Foods Corp.*, 60 Ill.App.3d 840, 377 N.E.2d 266. (App. K)

6. Consolidated then moved to dismiss the federal district court proceedings on the grounds of *res judicata*. On March 10, 1980, Judge Stanley J. Roszkowski entered his order denying the motion. (App. F)

7. The case was assigned to District Judge J. Sam Perry for trial and, after full discovery, was tried in August and September, 1980. On December 2, 1980, Judge Perry entered his Findings of Fact and Conclusions of Law in favor of Unger on the issues of discrimination

and retaliation (App. E) and entered judgment for $141,190.82 damages plus reasonable attorney's fees and costs in the federal court action. (App. D.)

8. Consolidated appealed to the United States Court of Appeals of the Seventh Circuit and Unger cross-appealed. On August 14, 1981, the Court of Appeals filed its opinion denying preclusive effect to the state court determination, affirming the judgment of Judge Perry on the issue of discrimination and damages and reversing on the issue of attorney's fees, holding that attorney's fees should have been allowed in both state and federal proceedings. *Unger* v. *Consolidated Foods Corporation*, 657 F.2d 909. (7th Cir. 1981) (App. C)

9. Consolidated Foods Corporation filed a Petition for Certiorari in this court. After the decision of this court in *Kremer* v. *Chemical Construction Corp.*, 456 U.S. ....., 102 S.Ct. 1883 (1982), this court granted Consolidated's Petition for Writ of Certiorari, vacated the judgment and remanded to the United States Court of Appeals for the Seventh Circuit for consideration in the light of *Kremer*. (App. B)

10. On July 19, 1982, each of the parties filed simultaneous statements of position pursuant to circuit court rule. No argument was heard on the remand. On November 26, 1982, the Court of Appeals filed its opinion holding that Kremer controlled the case and "must be applied retroactively." *Unger* v. *Consolidated Foods Corp.*, 693 F.2d 703 (7th Cir. 1982) (App. A). Accordingly, the court directed that the case be remanded to the district court with instructions to dismiss the complaint.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

THE KREMER DECISION SHOULD NOT BE APPLIED RETROACTIVELY IN THIS CASE.

The lead question in this case is whether Unger was required to foresee the *Kremer* decision when she sought state court review of the proceedings of the Illinois Fair Employment Practices Commission in March 1975. At that date, the rulings of this court, the Seventh Circuit, and other courts did not anticipate the *Kremer* decision. In the next six years the decisions in this case in the District Court and in the Court of Appeals for the Seventh Circuit, as well as decisions of other circuits and other districts did not foresee *Kremer* and held opposite to *Kremer*. Yet, the Court of Appeals, on the remand from this court in 1982, held that Unger, in 1975, should have foreseen the *Kremer* change. The result is unjust to Unger and a misapplication of the rule of *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). To avoid similar error in other cases applying the *Kremer* decision, it is important that this court correct the misapplication of the *Chevron* rule as soon as possible.

This court, in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), protected an employee litigant by refusing retroactive application of a new rule enunciated in *Rodrigue* v. *Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969). The new rule in *Rodrigue* was that remedies under state law rather than under the federal law of admiralty were applicable in a case involving death or injury to an employee occurring on fixed structures on the Outer Continental Shelf governed by the Outer Continental Shelf

Lands Act, 67 Stat. 462, 43 U.S.C. §1331 at *et. seq.* The court in *Chevron* held that it would not apply *Rodrigue* retroactively. Huson was thereby protected against the adverse application of the Louisiana statute of limitations which would, otherwise, have barred his action for injuries.

In *Chevron,* this court described the test for application of the doctrine of nonretroactivity in civil cases. Before stating the test, the court considered a number of factors. The court noted that Huson's injury occurred more than three years before the *Rodrigue* decision, that his lawsuit had been filed one year before the *Rodrigue* decision, and that, if the court applied the Louisiana statute of limitations, Huson's action would have been time barred "more than two years before *Rodrigue*" was decided. 404 U.S. at 105.

The court commented that it would be "anamolous indeed" to bar Huson's lawsuit retroactively. It observed "a primary purpose underlying the absorption of state law as federal law in the Lands Act was to aid injured employees by affording them comprehensive and familiar remedies." 404 U.S. at 108. Even though the court was not dealing with a fully tried case in *Chevron,* it commented that "to abruptly terminate this lawsuit that has proceeded through lengthy and, no doubt, costly discovery stages for a year would surely be inimical to the beneficent purpose of the Congress." 404 U.S. at 108.

This was the search for justice background in *Chevron Oil Company* v. *Huson.* There should be no different search in *Unger.* Both Unger and Huson were seeking protection of important rights as employees, Huson against personal injury and Unger against discriminatory discharge. The *Chevron* doctrine protects Unger from the

unexpected consequences of not resting at the end of the adverse administrative proceedings. Just as Huson was protected in his decision two years before *Rodrigue* that it was safe not to file suit on the theory that the Louisiana statute of limitations did not apply, Unger should be protected in her decision, seven years before *Kremer*, that it was safe to seek limited state judicial review without loss of her Title VII rights. The goal of any judicial proceeding must be substantial justice. That was the goal in *Chevron* as applied to Huson and it should be the goal here as applied to Unger.

The court in *Chevron* enunciated and applied what is now known as the *Chevron* test. The court stated the rule as one which has been "generally considered" as having "three separate factors." The court then stated the rule:

> "First, the decision to be applied retroactively must establish a new principle of law either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed."
>
> "Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retroactive operation will further or retard its operation' "; and
>
> "Finally, we have weighed the inequity imposed by retroactive application, for where a decision of this court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice and hardship' by a holding of nonreactivity . .. . ." 404 U.S. at 106.

The decision of the Court of Appeals on the remand in Unger is erroneous when tested against the *Chevron* standard. The rule of decision of *Kremer* should not be

applied retroactively against an employee entitled to Title VII relief for discrimination merely because she sought state court review of administrative proceedings for manifest error on a request made seven years before *Kremer*. The *Kremer* decision should be applied prospectively to avoid repeated loss of Title VII rights by litigants in Unger's position. It is important to all such litigants that this Court determine the issue of retroactivity or non-retroactivity of its decision in *Kremer*.

A. Kremer Decided an Issue of First Impression Whose Resolution Was Not Clearly Foreshadowed.

The rule of *Chevron*, as its initial standard for nonretroactivity, held that the new decision should establish a new principle of law in one of two ways:

1. By deciding an issue of first impression whose resolution was not clearly foreshadowed; or
2. By overruling clear past precedent on which litigants may have relied.

Kremer precisely fits the first part of the *Chevron* test as a decision "of an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil Co.* v. *Huson*, 404 U.S. at 106.

The decision in *Kremer* was the first decision of this court holding that a state court decision on review of a state administrative proceeding bars a Title VII action in the District Court. In 1975, when Unger sought judicial review of the administrative record in the state court, nothing in the language of Title VII, the decision of this court in *Alexander* v. *Gardner-Denver Company*, 415 U.S. 36 (1974), or the decisions of the district courts and courts of appeal foreshadowed the manner in which *Kremer* would be decided. After 1975 and until *Kremer*, the case

law relating to Title VII uniformly, with one exception, gave paramount interest to the right of the aggrieved employee to redress discrimination by a Title VII civil action in the federal court as provided in Section 706(f), regardless of other decisions by other agencies. The only case holding otherwise was *Sinicropi* v. *Nassau County*, 601 F.2d 60 (2d Cir. 1979) *cert. denied*, 444 U.S. 983 (1979).

At the time Unger sought judicial review in the state court, the express language of Title VII indicated that prior state administrative and judicial proceedings did not bar an aggrieved individual from filing a Title VII action in the federal court. Section 706(f) specifically provided for a "civil action in the federal court." The Supreme Court interpreted the term "civil action" to authorize a "trial de novo." *Chandler* v. *Roudebush*, 425 U.S. 840, 844-845 (1976); *Alexander* v. *Gardner-Denver Company*, 415 U.S. at 38; *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798-799 (1973). Further, Section 706(c) of Title VII expressly provided for the filing of a discrimination charge after commencement of "proceedings" commenced under state or local law unless earlier terminated. In addition, Section 706(b) stated that "proceedings under state or local law" be accorded only "substantial," not preclusive, weight by the EEOC. The express language of the statute did not differentiate between administrative and judicial proceedings.

In addition to the express language of Title VII, at the time that Unger sought review under the Illinois Administrative Review Act, the United States Supreme Court in *Alexander* had expressed the rationale for a *de novo* trial in the federal court under Title VII. In that decision, the court emphasized the overlapping, indepen-

dent, and supplementary discrimination remedies available to an aggrieved individual:

> "Title VII provides for consideration of employment discrimination claims in *several forums* . . . and, in general, submission of a claim to one forum *does not preclude* a later submission to another. Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." *Alexander* v. *Gardner-Denver Company,* 415 U.S. at 47-48. (Emphasis added.)

Further, the federal district and circuit courts, which had considered the preclusion decision in the Title VII context at the time Unger sought judicial review, repeatedly stated that the preclusion doctrines did not apply to a Title VII action as a matter of law. *Voutsis* v. *Union Carbide Corporation,* 452 F.2d 889, 894 (2d Cir. 1971) (not barred by an alleged settlement made in the state admistrative proceeding and appeal to state court remanded for purpose of making more complete record). *Cooper* v. *Philip Morris, Inc.,* 464 F.2d 9, 11 (6th Cir. 1972) (not barred by relief granted by a state administrative agency). *Young* v. *Southside Packing Company,* 369 F.Supp. 59, 60 (E.D.Wis. 1973) (not barred by relief granted in state administrative proceedings). *Batiste* v. *Furnco Construction Corp.,* 503 F.2d 447 (7th Cir. 1974), *cert. denied,* 420 U.S. 928 (1974) (not barred by administrative proceeding completed and state court judicial review sought by defendant employer but not completed).

When Unger sought judicial review, the *Kremer* decision was not foreshadowed. The year before, the Seventh Circuit had decided *Batiste* v. *Furnco Construction Corp.,*

503 F.2d 447 (7th Cir. 1974). In *Batiste*, the court refused to apply the doctrine of res judicata to bar the plaintiffs from a Title VII action in federal court on their claims of race discrimination where the plaintiffs had completed state administrative proceedings and the defendant had appealed the administrative decision to the Illinois Circuit Court for judicial review. The court noted that ". . . full faith and credit implemented by federal statute (28 U.S.C. §1738) is the means by which state adjudications are made res judicata . . . ." However, the court also noted that "other well defined federal policies, statutory or constitutional, may complete with those policies underlying Section 1738." 503 F.2d at 450. The court continued: "It has been determined that the Congressional policies embodied in Title VII require that res judicata not be applied to state adjudications." 503 F.2d at 450.

Subsequently, after Unger filed suit in the federal court, her position on the preclusion issue was reaffirmed at every level of the federal proceedings. On March 10, 1980 District Court Judge Stanley J. Roszkowski denied defendant's Motion for Summary Judgment. Judge Rozkowski referred to *Batiste*, stating:

> ". . . the Seventh Circuit Court of Appeals held that the doctrine of res judicata was not applicable to bar claims under Title VII of the Civil Rights Act of 1964 on the ground that plaintiffs had litigated their charges in state proceedings and that the federal courts must conduct their own inquiry into claimed discriminatory employment practices. The court noted a strong Congressional policy that plaintiffs not be deprived of their right to resort to the federal courts for adjudication of their federal claims under Title VII." (App. F; at F-3)

In affirming the district court's position on the preclusion issue, the Seventh Circuit in *Unger* v. *Consol-*

idated Foods Corp., 657 F.2d 909 (7th Cir. 1981) relied on the language of Title VII, its prior decision in *Batiste*, and the United States Supreme Court's decision in *Alexander*. The court stated:

> "With the exception of the Second Circuit's brief per curiam opinion in *Sinicropi* v. *Nassau County*, 601 F.2d 60 (2d Cir. 1979), *cert. denied*, 444 U.S. 983 (1979), every court to address the question of the relationship between federal judicial proceedings under Title VII and related state proceedings concerning employment discrimination has used reasoning consistent with our *Batiste* analysis and has refused to give preclusive effect to the state proceedings." See *Smouse* v. *General Electric Company*, 626 F.2d 333, 336 (3rd Cir. 1980) (per curiam); *Gunther* v. *Iowa State Men's Reformatory*, 612 F.2d 1079, 1084-85 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980); *Cooper* v. *Philip Morris, Inc.*, 464 F.2d 9, 11-12 (6th Cir. 1972); *Kralowec* v. *Prince George's County, M.D.*, 503 F.Supp. 985, 990-93 (D.Md. 1980)." (657 F.2d at 914; App. C at C-6).

The first decision which indicated that the preclusion doctrine might be applied in a Title VII context was decided in the Second Circuit in 1979, four years after Unger sought state court review of the administrative record. *Sinicropi* v. *Nassau County*, 601 F.2d 60 (2d Cir. 1979). Prior to *Sinicropi*, the rule in the Second Circuit, consistent with other courts in other circuits, indicated that the preclusion doctrine would not be applied to bar a Title VII action. *Voutsis* v. *Union Carbide Corporation*, 452 F.2d 889 (2d Cir. 1971). In 1978, the District Court for the Southern District of New York in the initial *Kremer* decision refused to give *res judicata* effect to a state court determination in a Title VII action, relying on *Voutsis*. *Kremer* v. *Chemical*

Construction Corp., 464 F.Supp. 468 (S.D.N.Y. 1978). It was only after the Second Circuit's decision in *Sinicropi* that the District Court, on Chemical's renewed Motion to Dismiss, held that it must allow the motion on the basis of *Sinicropi*. However, the district judge remained critical of the *Sinicropi* decision. *Kremer* v. *Chemical Construction Corp.*, 477 F.Supp. 587 (S.D.N.Y. 1979). Thus, until the *Sinicropi* decision in 1979, there was no decision, even in the Second Circuit, which would indicate that Unger's Title VII action would be barred by her request for review in the state court. There was nothing in the state of the law at the time of her decision by which she could have foreseen the substantial shift in doctrine represented by the decision in *Kremer*.

The Seventh Circuit, on the remand, determined that Unger should have had more foresight in detecting the future decision in *Kremer* than the Seventh Circuit itself and, thereby, held that *Kremer* should be applied retroactively. Unger was not permitted to rely on the very authority relied on by the Seventh Circuit in its first *Unger* decision. *Unger* v. *Consolidated Foods Corporation*, 657 F.2d 909 (7th Cir. 1981). In considering the question of foreseeability, the Court of Appeals in its remand decision was faced with its own clear statement in *Batiste* v. *Furnco Construction Corp.*, 503 F.2d 447 (7th Cir. 1974) *cert. denied*, 420 U.S. 928 (1974). The court first quotes *Batiste* as follows:

> "'We must agree with the ruling in *Cooper* v. *Philip Morris, Inc.*, 464 F.2d 9 (6th Cir. 1972) where the court squarely rejected the application of the doctrines of election of remedies and res judicata to Title VII actions where plaintiffs had litigated their charges to final adjudication in state *proceedings.*' 503 F.2d at 450 (emphasis supplied)." *Unger* v. *Con-*

solidated Foods Corp., 693 F.2d at 708, App. A, at A-11.

The Court of Appeals then explains that this language really did not mean what it says, stating, immediately after its *Batiste* quotation:

> "Admittedly there is ambiguity on the face of this statement; 'proceedings' could refer either to state *agency* proceedings only or to state *court* proceedings as well. 693 F.2d at 709. (App. A at A-11)

The Court of Appeals, on the the remand, held Unger to an impossibly high standard of foreseeability when she decided to seek review under the Illinois Administrative Review Act in 1975. Even the defendant, Consolidated Foods Corporation, did not foresee *Kremer*. After Consolidated filed its Appeal to the Illinois Appellate Court, it requested that the district court stay further proceedings in the Title VII action since, if Unger continued successfully in the state court, it might not be necessary for her to pursue her Title VII action. Consolidated conceded that the federal court action would not be barred by the "state court proceedings." In its Memorandum in support of its motion to stay, Consolidated stated:

> "Defendant, in making it's Motion to Stay, recognizes that *state court proceedings are not a bar* to Title VII suits. *Batiste* v. *Furnco Construction Corporation*, 503 F.2d 437 (1974), *cert. denied*, 420 U.S. 928 (1974). Defendant, however, does not seek a bar to these proceedings. A stay is sought because it insures the most efficient and economical use of this court's time." (App. G at G-1; emphasis supplied).

Even if Consolidated's statement in its Memorandum is not a waiver of the right to object later, it is a clear

statement that *Kremer* was not "clearly foreshadowed" and was a case of first impression. The effect of the court's decision was that Unger, unlike the court or even opposing counsel, was required to anticipate the *Kremer* decision seven years later.

When the right to sue letter was received on November 3, 1976, Unger promptly filed her action in the District Court to assert her rights. Unfortunately, she is now required to have known that the action to seek state court review of the administrative proceedings would turn out to be fatal to the exercise of her substantial rights under Title VII. The unfairness of such a rule is plain for, if *Kremer* had been decided in 1974, Unger's decision would have been quite simple. She would have merely stopped further state proceedings at the administrative level, waited for the right to sue letter from EEOC, and proceeded to file her case in the United States District Court under Title VII.

B. The Retroactive Application of Kremer is Not Necessary to Further the Kremer Rule.

The second factor in *Chevron* was "whether retrospective operation will further or retard" the operation of the new rule. *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 107 (1971). The rule of *Kremer* barred Title VII proceedings where there was a state court judgment on the issue of discrimination. Retroactive application of the *Kremer* rule to the *Unger* case will neither further nor retard the operation of that rule because the *Unger* case was tried in federal court prior to this court's grant of certiorari in the *Kremer* case. Furthermore, the trial court's decision was affirmed on appeal prior to this courts' decision in *Kremer*.

The Court of Appeals had some difficulty in deciding how retroactive application of *Kremer* would further the rule. (App. A at A-15) It had a case in which there had been a federal court trial and findings of discrimination, both in the original discharge and in the retaliatory second discharge. Ultimately, the Court of Appeals relied on comity and concluded that comity, rather than a national policy against discrimination, is the overriding doctrine here and that, therefore, *Kremer* should be applied retroactively. But this is not the second part of the *Chevron* test which focuses only on whether the rule of *Kremer* is furthered or retarded by retroactive application.

The Court of Appeals, in discussing the second part of the *Chevron* test in its decision on the remand, added an additional element to the *Chevron* test by stating as follows:

> "There is no compelling reason for giving only prospective effect to *Kremer* and allowing one more federal case to proceed to finality in the face of a contrary state decision." *Unger* v. *Consolidated Foods Corporation*, 693 F.2d at 710; App. A at A-15.

Chevron does not require the showing of a "compelling reason" for prospectivity. This court should reject this accretion to the *Chevron* test, for the addition of a requirement of "compelling reason" destroys the *Chevron* test. The addition of a duty to show "compelling reason" moves the test from the objective to the subjective.

C. The Kremer Decision, Applied Retroactively to Unger, Produces Substantial Inequitable Results.

The third part of the *Chevron* test was stated by the Court in *Chevron*:

> "Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.'' *Chevron Oil Co.* v. *Huson*, 404 U.S. at 106

There was, of course, substantial injustice in the retroactive application of *Kremer* to Unger. Trudy Unger was a single litigant in a suit against a major corporation. She had never had a trial with full discovery and all of the protections of a formal court proceeding—other than in the United States District Court.

She took the reasonable step of seeking correction of what appeared to her to have been an obvious error in the administrative proceeding by requesting review in the Illinois circuit court. That action could have resolved the matter with no necessity for a judicial trial. It would be unfair and inequitable, applying the *Chevron* test, to penalize the employee for taking a step which could have saved the necessity of such a trial and which was consistent with the state of the law at the time.

In the *Unger* case there is an even more substantial injustice in penalizing Unger for using a common sense effort to correct what she conceived to be manifest error. The error sought to be corrected arose from defendant's willingness to use fundamentally flawed evidence to make its main defensive point in the state proceedings—i.e., that Unger's discharge was merely part of a reorganization of the Sirena sales force in which five other representatives, all men, were discharged.

In considering how defendant's evidence misled the Hearing Officer on this point, the court should recog-

nize the nature of an administrative hearing before a hearing officer who is not a member of the administrative agency, a public employee, or a constitutional judge. The hearing officer was a busy private lawyer who took the evidence in his office. Under these circumstances, late in the proceedings, Consolidated, through the testimony of its Sales Manager, Maurice "Corky" Newman, asserted that five other sales representatives, all men, had been terminated as a result of a sales reorganization. The evidence was objected to because Consolidated had not produced evidence that the situation of the five other sales representatives was comparable and had not produced their personnel files. The hearing officer received the evidence with the statement that he would consider it, giving such weight as he deemed appropriate. This is not an uncommon methodology in informal hearings of this nature. Based on that evidence, the hearing officer, with respect to the discharge, was able to include reference to a so-called reorganization and use that as the principal ground for the failure to find discrimination. (App. I at I-20, 21) That finding, found its way, ultimately, into the decision of the Illinois Appellate Court. *Unger* v. *Sirena Division of Consolidated Foods,* 60 Ill.App.3d at 845, App. K at K-8.

Prior to the trial in the District Court, there was full discovery, including the deposition on the West Coast of Mr. Newman who, by then, no longer worked for Consolidated, and review of all related files, including the executive minutes of the Sirena Division of Consolidated. Based on that discovery, the plaintiff, in the trial in the district court, was able to meet the evidence which had misled the hearing officer in the state proceedings. The findings of Judge Perry are significant on this point:

"22. Unger's termination did not stem from a corporate reorganization. Defendant claims that the discharge of five sales representatives, all of whom are men, is evidence of a corporate reorganization and lack of discrimination in the Unger discharge. The defendant failed to show any relationship between the discharge of the five representatives and the claim of corporate reorganization. The five male representatives discharged were Harry Copeland, Cy Martin, Robert Burgy, Earl Gorel, and Howard Gorrel. There was no relationship between these discharges and the claim of reorganization or the Unger discharge for the following reasons:

"A. According to the testimony of defendant's witnesses as well as the sales figures and notations in the Executive Minutes, the sales representatives Burgy, Earl Gorel, and Howard Gorrell were admittedly incompetent and discharged for incompetencey. There was no evidence of Unger's incompetency.

"B. The testimony discloses that Copeland was in his mid-70's and many years beyond retirement and had told the company that he wanted to retire both for age and for physical impairment. Unger was 52 years of age and had not indicated any desire to retire.

"C. Cy Martin, the representative in California, carried other lines and, in 1971, his territory was reorganized with certain of his accounts assigned to Weinstock, who had joined the company as Vice President. Martin was given the opportunity to work with Weinstock and did for that sales year. Martin finally decided that he did not want to work under those conditions and left the company. Unger was given no consideration in retaining her territory under any changed conditions.

> "D. Other than the testimony of Newman and Seckler, no background was supplied as to the termination of the five representatives and no documentation was introduced by the defendant pertaining thereto. The Court finds it difficult to believe that there was no documentary evidence pertaining to five terminations." (App. E at E-6)

Thus, the court, in considering whether there would be "substantial inequitable results" in applying *Kremer* retroactively must consider that retroactive application reinstates the decision of a hearing officer based on flawed evidence. That mistake was corrected by use of the full pre-trial discovery and trial in the District Court. It would be inequitable and, indeed, unjust to use *Kremer* to reinstate error.

Finally, this court should consider the denial of due process implicit in any retroactive application of the *Kremer* decision. Retroactive application of *Kremer* eliminates Unger's Title VII claim and deprives her of the opportunity to make a knowing and voluntary election of remedies. Unger thereby lost a protected property right and suffered a denial of due process. United States Constitution, Amendment V. When Unger sought state court review of the administrative proceedings in 1975, she could not know or expect that her decision would constitute a decision to abandon her remedies under Title VII.

Under the doctrine of *Logan* v. *Zimmerman Brush Company*, ... U.S. ....., 102 S.Ct. 1148 (1982), Unger can be seen as having a protected property right to relief under Title VII. In *Logan*, an employee successfully asserted that he was denied due process of law by the state of Illinois when the state terminated his cause of action under the Illinois Fair Employment

Practices Act by applying the statutory rule that required a fact-finding conference within 120 days following the filing of discriminatory charges under the FEPA. The hearing was not scheduled within that period and the Illinois Supreme Court held that Logan lost his rights to relief under the Act. This court held that such a result was a denial of due process.

Just as Logan possessed a protected property interest in a cause of action under the Illinois Fair Employment Practices Act, Unger possessed a similar protected property interest in her Title VII claim. Under prior law, Unger held parallel state and federal remedies. Pursuit of one remedy did not preclude the other. Thus, when Unger sought judicial review in the state court, she did not face an election of remedies. Seven years later, this court in *Kremer,* stated that a Title VII plaintiff, by pursuing judicial review in the state court, was barred from proceeding in a Title VII action in a federal court. If that change in law is to be applied retroactively, Unger must be seen as having been put, quite unknowingly and involuntarily, to an election of remedies and a waiver of her Title VII action.

While *Unger* is not the same clear cut abuse of due process as is apparent in *Logan,* nevertheless, the abuse remains. If there is to be a change in law, it should not be permitted to impact adversely and result in the loss of remedies to one who was actively in pursuit of Title VII relief. The fact that Unger filed her complaint with EEOC initially and never withdrew that complaint indicated that she had no intention of waiving any rights under Title VII.

The underpinning of due process, just as the underpinning of *Chevron,* is fundamental fairness. There is a

fundamental unfairness in constructing a new rule of procedural law and applying it to eliminate an important remedy retroactively. In simplest terms, Unger had, all along, expected to retain a right to Title VII relief. The importance of that relief was well demonstrated in this case. The retroactive application of *Kremer* to take that relief from her is substantial injustice and, indeed, moves into the area of denial of due process. Constitution of the United States, Amendment 5.

II.

THE KREMER RULE IS NOT APPLICABLE TO THE UNGER CASE WHERE THERE WAS NO JUDICIAL DETERMINATION ON THE ISSUE OF DISCRIMINATION.

It is important that this court take jurisdiction on certiorari to achieve prompt correction of the extension of the *Kremer* rule to cases in which there was no state court determination on the question of discrimination.

In *Kremer* v. *Chemical Construction Corp.*, 456 U.S. ....., 73 L.Ed 2d 1297, 102 S.Ct. 2288 (1982), this Court held that a decision of a state court, upholding a state administrative agency's rejection of an employment discrimination claim as meritless, was to be given *res judicata* effect by the federal court in a Title VII case.

There is a fundamental distinction between the nature of the state court judicial determination in *Kremer* v. *State Division of Human Rights*, 402 N.Y.S.2d 699 (1978) (decided without opinion,) and the nature of the state court judicial determination in *Unger*. *Unger* v. *Sirena Division of Consolidated Foods Corp.*, 60 Ill. App.3d 340 (1978), App. K.

In *Kremer,* the hearing officer dismissed Kremer's complaint of discrimination for lack of probable cause. Kremer next sought review by the NYHRD Appeal Board of the determination of lack of probable cause. The Appeal Board affirmed the finding of lack of probable cause. Kremer next applied to the Appellate Division of the New York Supreme Court to set aside the adverse administrative determination. The Appellate Division unanimously affirmed the Appeal Board's order without opinion. *Kremer* v. *State Division of Human Rights,* 402 N.Y.S. 2d 699 (1978) Kremer did not seek review by the New York Court of Appeals.

Kremer then requested consideration by the EEOC under Title VII of the Civil Rights Act. The district director of the EEOC ruled that there was no probable cause to believe that the charge of discrimination was true and issued the right to sue letter. The district director denied a request for reconsideration. Kremer then brought the Title VII action in the District Court for the Southern District of New York. The district court initially denied Chemico's motion to dismiss. *Kremer* v. *Chemical Construction Corp.,* 464 F.Supp. 468 (S.D.N.Y. 1978) After the decision in *Sinicropi,* the district court reconsidered the case and dismissed the complaint on the grounds of *res judicata. Kremer* v. *Chemical Construction Corp.,* 477 F.Supp. 587 (S.D.N.Y. 1979), affirmed, 623 F.2d 786 (2d Cir. 1980).

On Petition for Certiorari, this Court in *Kremer* v. *Chemical Construction Corp.,* 456 U.S. ....., 72 L.Ed.2d 262, 102 S.Ct. 1883 (1982) held that the decision of the New York court was a decision on the merits of the discrimination claim. This court reviewed the *Kremer* proceedings and held that, when the New York court

ruled that the uncontroverted facts showed that Kremer had no probable cause for proceeding further, this state court decision was a decision that Kremer's case was meritless and, necessarily, was a decision on the issue of discrimination. As stated by this court:

> "The Appellate Division's affirmance of the NYHRD's dismissal *necessarily* decided that petitioner's claim under New York law was meritless, and thus, it also decided that a Title VII claim arising from the same events would be equally meritless." (Emphasis supplied) 456 U.S. ....., 102 S.Ct. at 1896.

Kremer and *Unger* differ in two major respects. First, the cases differ in the results reached at each stage in the proceedings. In *Kremer,* every hearing body—administrative agency or court--uniformly held that there was no probable cause. Contrasted to the uniform and repeated finding of lack of probable cause in *Kremer,* is the route of the *Unger* case where, at every stage of the administrative proceedings and the proceedings in the Illinois courts there was a different result from the one below.

Second, and more importantly, the legal effect of the decision of the state court in *Kremer* is in vivid contrast to the decision of the state court in *Unger.* In *Kremer,* the state court's affirmance of the NYHRD's determination of no probable cause was a decision that, as a matter of law, the uncontroverted facts submitted to the agency failed to raise probable cause of discrimination or create any reason to proceed to hearing. *Kremer* v. *State Division of Human Rights,* 402 N.Y.S. 2d 699 (1978). In *Unger,* however, the state court merely decided that, based on all of the evidence before the administrative

agency, it could not be said that the decision of the agency was against the manifest weight of the evidence.

In contrast to the decision of the New York state court on the issue of probable cause, the Illinois state court in this case followed a deferential standard of review in which the agency, not the court, decided the merits of petitioner's discrimination claim. In *Unger* v. *Sirena, Division of Consolidated Foods Corporation*, 60 Ill.App.3d 40, 377 N.E.2d 266, 267 (1st Dist. 1978), (App. K), the Illinois Appellate Court for the First District stated the deferential standard of judicial review of an administrative decision of the FEPC as follows:

> "In reviewing the commission's action, the court must decide whether the agency's determination is against the manifest weight of the evidence. . . . Upon review of the dismissal of a charge by the commission, the proper scope of review is to ascertain from an adequate record whether the commission's order of dismissal is arbitrary, capricious, or an abuse of discretion." (App. K at K-8)

Section 10 of the Illinois Fair Employment Practices Act specifies that judicial review of an FEPC decision may be had in accordance with the terms of the Administrative Review Act. Ill.Rev.Stat. 1975, ch. 48, ¶ 860. Section 11 of the Administrative Review Act provides as follows:

> "No new or additional evidence in support of or in opposition to any finding, order, determination or decision of the administrative agency shall be heard by the court. The findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct." Ill.Rev. Stat., 1975, ch. 110, ¶264.

The Illinois judicial proceeding in *Unger*, under the Illinois Administrative Review Act, could not and did not make a determination of discrimination or lack of discrimination. It considered only the question of whether the agency's determination was so far against its record as to be against the manifest weight of the evidence.

By contrast, *Kremer* was a decision based on a judicial determination that there was no discrimination—based on all of the uncontroverted facts. It was a judicial decision that there was not sufficient evidence to go forward and have a hearing. It was, in short, a determination that there was no case.

CONCLUSION

On the basis of the foregoing facts, arguments, and authorities, petitioner respectfully requests that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 80-2792 and 80-2844

TRUDY UNGER,

Plaintiff-Appellee,
Counter-Appellant,

v.

CONSOLIDATED FOODS CORPORATION,

Defendant-Appellant,
Counter-Appellee.

On Remand from the Supreme Court of the United States.

NOVEMBER 26, 1982

Before CUMMINGS, *Chief Judge,** MARKEY, *Chief Judge,*** and CUDAHY, *Circuit Judge.*

CUMMINGS, *Chief Judge.* On June 1, 1982, the Supreme Court issued an order in this case granting the petition for a writ of certiorari, vacating the judgment of this Court in the above-titled cause (657 F.2d 909) and re-

* The Honorable Robert A. Sprecher was originally the third member of this panel, but his untimely death prevented his participation in this case on remand. Chief Judge Cummings was chosen by lot to take his place.

** The Honorable Howard T. Markey, Chief Judge, United States Court of Appeals for the Federal Circuit, is sitting by designation.

manding the case for further consideration in light of *Kremer v. Chemical Construction Corp.*, 456 U.S. ....., 102 S.Ct. 1883 (1982). We have given careful consideration to the *Kremer* opinion and the statements filed by the parties pursuant to Circuit Rule 19. Defendant emphasizes the similarity of the *Kremer* and *Unger* cases and urges us to dismiss the cases as res judicata. Plaintiff argues that *Kremer* is distinguishable, or alternatively, that *Kremer* should not be applied retrospectively. For the reasons articulated below, we have come to the conclusion that this case is controlled by *Kremer* and that *Kremer* must be applied retrospectively. Accordingly, we remand the case to the district court with instructions to dismiss the complaint.

I.

The facts of the case are fully set forth in our prior opinion; a brief summary will suffice here. In October 1972, Trudy Unger filed a complaint before the Illinois Fair Employment Practices Commission (FEPC) alleging that her first discharge from the employ of Sirena Division of Consolidated Foods Corporation was discriminatory and her second retaliatory. After a hearing, the Hearing Examiner found against plaintiff on the first discharge and in her favor on the second. The full Commission, however, in 1975 concluded that Trudy Unger was not a victim of sex discrimination on either count. She then sought administrative review in the Circuit Court of Cook County, which reversed the FEPC. Sometime in 1976, defendant appealed the state decision to the Illinois Appellate Court, and in February 1977, plaintiff filed a Title VII suit in Federal District Court. In 1978, the Illinois Appellate Court reversed the Circuit Court and reinstated the decision of the Commission.[1] Leave to appeal to the Illinois Supreme Court was denied; the Illinois state case thus concluded in defendant's favor.

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[1] *Unger v. Sirena Division of Consolidated Foods*, 60 Ill. App. 3d 840, 377 N.E.2d 266 (1st Dist. 3d Div. 1978).

In 1980 in the District Court defendant argued before Judge Roszkowski that plaintiff Unger's suit was barred by res judicata,[2] but the motion to dismiss was denied on Title VII policy grounds and the federal case proceeded to trial. A bench trial before Judge J. Sam Perry resulted in a verdict and judgment in Trudy Unger's favor. Defendant appealed and we affirmed on both the res judicata issue and on the merits of the case.

Prior to our decision in this case, the Supreme Court granted certiorari in *Kremer v. Chemical Construction Corp.*, 623 F.2d 786 (2d Cir. 1980), a Title VII collateral estoppel case.[3] Soon after this Court's decision, defendant filed a petition for certiorari and moved the Supreme Court to consolidate *Unger* with *Kremer*. That motion was denied. On May 17, 1982, the Supreme Court held in *Kremer* that Title VII does not effect a partial repeal by implication of 28 U.S.C. § 1738.[4] A federal court confronted with a Title VII discrimination

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[2] There has been some confusion among the parties and courts involved over the terminology in this case, to wit, whether it is res judicata (claim preclusion) or collateral estoppel (issue preclusion) that might preclude the Title VII case. Technically only collateral estoppel is involved. Since the same discriminatory acts were alleged in state and federal proceedings, there is no suggestion that the final state court judgment bars any claim that could have been brought but was not. Therefore henceforth we call the defense collateral estoppel.

[3] Plaintiff in *Kremer*, as in the case before us, asserted the same claims in state and federal proceedings, so that claim preclusion was not an issue.

[4] In the Act of May 26, 1790, Congress required all federal courts to give such preclusive effect to state court judgments "as they have by law or usage in the courts of the State from which they are taken." In essentially unchanged form, the Act, now codified as 28 U.S.C. § 1738, provides in pertinent part that the "judicial proceedings of any court of any such State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."

complaint must give preclusive effect to a prior state court judgment on the same matter—assuming that the plaintiff previously had a "full and fair opportunity" to litigate.

II.

The ultimate question in this case is whether the prior state court judgment in *Unger* must be accorded preclusive effect under the collateral estoppel analysis of *Kremer*. As a threshold matter this Court must consider whether the cases are sufficiently similar that the *Kremer* analysis may appropriately be applied to *Unger*. In *Kremer*, plaintiff filed a complaint before the New York State Division of Human Rights, where, after informal proceedings, his complaint was dismissed for lack of probable cause. That decision was sustained throughout the New York State courts.[5] Only after the end of all state court proceedings did Kremer file a Title VII suit in district court. *Kremer* is thus a straightforward collateral estoppel case. It is virtually the paradigmatic case in that the only question before the Supreme Court was the preclusive effect of a state court proceeding that concededly was final before the federal suit was filed. *Unger* is complicated procedurally by the fact that plaintiff conducted parallel suits in state and federal court; the collateral estoppel effect of the state court proceeding thus varied from time to time. Moreover, while Kremer lost consistently throughout state and federal proceedings and no federal trial was held, Unger won at the Illinois Circuit Court level, defendant's collateral estoppel argument was rejected in federal district court, and a federal trial was held on the Title VII complaint.

Despite these differences in the sequencing of the state and federal suits in the two cases, it is our conclusion that *Kremer* is indeed relevant precedent. When the procedural underbrush of *Unger* is cleared away, it is

[5] Trudy Unger received far more thorough consideration of her claims in both the state agency and the state courts.

apparent that a final state judgment preceded the federal trial. As between two actions pending at the same time, the first of two judgments has preclusive effect on the second. 18 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4404; Restatement (Second) of Judgments, § 14 (res judicata), § 27, Comment l (collateral estoppel)(1981) . Following this rule and the teaching of *Kremer*, the district court properly might have granted defendant's timely motion to dismiss the suit on a collateral estoppel ground at the time of the Illinois Appellate Court's reversal.

This Court, on remand, is again in the position of reviewing the propriety of the district court's refusal to dismiss the suit on a collateral estoppel ground. The fact that the case went to trial is itself of no consequence. The denial of the collateral estoppel motion to dismiss is not a collateral order appealable under 28 U.S.C. § 1291; appeal of the district judge's decision had to await the end of the trial.

III.

We now turn to the question of whether under *Kremer* the Illinois state court decision should bar plaintiff. Three points may be disposed of briefly at the outset. First, according to general preclusion principles, a prior action bars a subsequent action only if the same parties and the same cause of action are involved in both suits. We note that the Illinois prohibition against discrimination in employment, Ill. Rev. Stat. ch. 48, § 853, is at least as broad as that of Title VII, and that plaintiff Unger alleged the same discriminatory conduct in state and federal court; thus the same claims of discrimination as well as the same parties are involved in the state and federal suits. Second, the Illinois proceedings satisfy the due process requirements set forth in *Kremer*, 102 S.Ct. at 1896-99. At an FEPC hearing the parties may be represented by counsel, testimony is under oath and cross-examination is permitted, the rules of evidence used in Illinois courts apply, and compulsory process is available. *See* Rules and Regulations of the Illinois Fair Employment Practices Commission (issued

pursuant to Ill. Rev. Stat. ch. 48, § 856.05 (1975)). The reviewing court is also empowered to remand the case to the agency for the taking of further evidence. Ill. Rev. Stat. ch. 110, § 275(1)(g). Third, a final judgment of the Illinois Appellate Court on administrative review would be accorded preclusive effect by the Illinois courts. *See Lee v. City of Peoria*, 684 F.2d 196 (7th Cir. 1982). Section 1738 requires the federal court to accord the state court decision a like effect. If plaintiff Unger is to avoid the reach of *Kremer*, it must be on some other grounds.

Plaintiff Unger argues that *Unger* and *Kremer* are distinguishable in terms of the standards of administrative review applied by the Illinois and New York courts. Her contention is that a prior judgment can have preclusive effect only if it was a decision on the very question presented to the second court. The point is essentially that made by Justice Blackmun in his *Kremer* dissent, 102 S.Ct. at 1903, in which he argued that the New York Appellate Division "made no finding one way or the other concerning the *merits* of petitioner's claim" (emphasis in original) because the court was reviewing the agency's decision process rather than directly addressing the question of whether Rubin Kremer had been discriminated against. Thus "since the discrimination claim, not the validity of the state agency's decision, is the issue before the federal court," the state court decision should not be a bar according to his dissent. *Id.* Unger maintains that the New York standard of review was so stringent as to amount to a decision on the merits (and thus a decision on the issue raised in the Title VII complaint), while the Illinois courts' review, being deferential, was a review of the administrative proceeding and thus did not constitute a finding one way or the other as to whether she was a victim of discrimination.[6]

[6] While this technically may be true, as a practical matter the Illinois Appellate Court concluded that the FEPC's finding that her first discharge was not discriminatory was "amply supported by the record" (377 N.E.2d at 271) and that there was "overwhelming support" for the determination that the second discharge was not retaliatory (377 N.E.2d at 272).

We do not, however, discern any practical difference in the standards of review applied by the Illinois and New York courts. According to the Illinois Appellate Court in *Unger*, 377 N.E.2d at 270-71, "upon review of the dismissal of a charge by the [FEPC], the scope of review is to ascertain from an adequate record whether the commission's order of dismissal is arbitrary, capricious, or an abuse of discretion." The *Kremer* Court surveyed the New York standard of review in footnote 21, 102 S.Ct. at 1896, and quoted language from a number of New York decisions which require that an agency dismissal for lack of probable cause be affirmed if it appears "virtually as a matter of law that the complaint lacks merit." This might indicate a stringent standard of review. However, one of the quotations describes the standard as requiring only a "rational basis in the record." It also appears that the Supreme Court majority was picking these quotes selectively in an attempt to counter Justice Blackmun's objection that the New York decision was not on the merits.[7] The full texts of the cases cited in footnote 21 contain numerous references to the standard of review, such as: "there is evidence in the record," "substantial evidence," "arbitrary and capricious or characterized by abuse of discretion" and "clearly unwarranted exercise of discretion." The New York and Illinois courts thus appear to be applying the

[7] It is unclear why the majority took up Justice Blackmun's challenge on this point. Given that the majority Justices found no support in the legislative history of Title VII for a partial repeal of Section 1738, a federal court should be foreclosed from inquiring into the nature of the state court decision if the state would grant it preclusive effect and assuming the due process concerns noted above were satisfied. In any event, Justice Blackmun was apparently not convinced. In his dissent, 102 S.Ct. at 1903, he noted that the New York court "merely found that the agency's decision was not arbitrary or capricious." Plaintiff Unger thus adopts Justice Blackmun's argument for denying collateral estoppel effect to a state court administrative review proceeding, but rejects his characterization of the nature of administrative review in New York.

same deferential standard of administrative review. Therefore, there is no basis for distinguishing *Kremer* and *Unger* in terms of the stringency of administrative review.

Further, there are at least two reasons for rejecting any argument directed to the absence of a state court *de novo* trial or some "decision on the merits" equivalent. First, the Supreme Court has already done so; the *Kremer* Court was fully aware that the New York state courts were conducting an administrative review of a state agency proceeding. Second, Unger's argument proves too much: by her logic, no state court administrative review decision would have to be accorded preclusive effect by the federal courts regardless of whether that state's courts would do so. That, however, would be clearly inconsistent with Section 1738 which is the statutory version of the full faith and credit clause.

IV.

Plaintiff next argues that if this Court concludes that disposition of her case is governed by *Kremer*, we nevertheless should decline to apply *Kremer* retrospectively. We must reject that argument.

If we had initially taken the course followed by the Second Circuit (and adopted by the Supreme Court) and held that under the collateral estoppel doctrine the state court decision bars a Title VII suit, or if *Kremer* had been decided a few months earlier, Trudy Unger would have no argument that she had been deprived retrospectively of federal vindication of her claims; she would merely have lost. Further, the outcome for two similarly situated plaintiffs should not depend on the happenstance of which case reaches the Supreme Court first. As Justice Douglas put it in an analogous retrospectivity case, when the relative order of the two cases "is largely a matter of chance . . . [e]qual justice does not permit a [party's] fate to depend on such a fortuity." *United States v. Peltier*, 422 U.S. 531, 543 (dissenting opinion).

Under *Chevron Oil v. Huson*, 404 U.S. 97, 106-107, there are three factors to consider in deciding whether a new Supreme Court decision in a civil case should be applied prospectively only:

1. whether the decision establishes a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed;[8]

2. whether retrospective application will further or retard application of the new rule; and

3. whether retrospective application would result in substantial injustice to the parties.

In *Chevron Oil* the issue was whether a state law statute of limitations should be applied to a tort claim based on an injury which occurred on a drilling rig. Under some ten years' precedent within the Fifth Circuit, the Outer Continental Shelf Lands Act had been construed to apply admiralty law and the doctrine of laches to such claims. Plaintiff filed his claim after the Louisiana statute of limitations had expired, but while the suit could have been brought in admiralty. While his suit was pending, the Supreme Court decided a similar case, *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, which held that state law governed such claims. Applying the three criteria noted above, the Supreme Court decided not to apply *Rodrigue* retrospectively to Huson's claim against Chevron Oil. First, the *Rodrigue* decision was an abrupt departure from settled prior law, and plaintiff, having no reason to suspect such a change in the law, had justifiably relied on laches. Second, the Supreme Court had switched from admiralty law to state law so that workers on the drilling rigs (and their

[8] According to Justice Blackmun in *United States v. Johnson*, 102 S.Ct. 2579, n.12 at 2587, the first factor is the "threshold test for determining whether or not a decision should be applied nonretrospectively." Once it has been determined that a decision provides the requisite break with the past, the court may go on to consider the other criteria.

attorneys) could use a body of law familiar to them from their on-shore state residences. Since the change in interpretation of the statute was designed to aid workers in Huson's position, the application of the rule would not be advanced by giving *Rodrigue* retrospective effect and leaving Huson in limbo between admiralty and state law. Third, Huson would have been left with no forum for his claim because of the fortuity of the change in the applicable limitations period. When these three criteria are applied to *Unger*, it is apparent that the same arguments for prospectivity cannot be made.

A. *The State of Prior Precedent*

1. *Overruling clear precedent*: Defendant argues that 28 U.S.C. § 1738 constitutes the applicable precedent, and Trudy Unger thus had no basis for thinking that a state court decision would not be accorded preclusive effect. Defendant's Statement of Position at 20. That argument is a little disingenuous; the issue is whether Title VII overrides § 1738. It is on this issue that Trudy Unger claims that *Kremer* is a sharp departure from clear prior law on which she had justifiably relied, but any clarity she sees is largely the product of wishful thinking. She claims reliance on three sources of precedent: the language of Title VII, *Alexander v. Gardner-Denver*, 415 U.S. 36, and our decision in *Batiste v. Furnco*, 503 F.2d 447 (7th Cir. 1974), certiorari denied, 420 U.S. 928 (1975). She cannot seriously argue about the language of Title VII since it is precisely the ambiguities in the statute that the Supreme Court construed in *Kremer*, and while *Gardner-Denver* and *Batiste* have language broad enough to support her contention that a prior state court judgment should not preclude a federal Title VII suit, the holding in each case is much narrower.

In *Alexander v. Gardner-Denver*, the Supreme Court held that an employee's statutory right to a federal trial under Title VII may not be foreclosed by prior submission of a claim to binding arbitration under the nondiscrimination clause of a collective bargaining agreement.

No state court proceeding was involved.[9] The facts thus provide no support for the proposition that a state court decision would not bar a federal Title VII suit. There is indeed language in the case that could be so construed, but upon closer examination it too fails to support plaintiff's position. For example, plaintiff cites the Supreme Court's comment that "in general, submission of a claim to one forum does not preclude a later submission to another." 415 U.S. at 47-48. This statement appears in the context of a comparison between private arbitration and federal *de novo* trials; state court decisions are nowhere mentioned. Even more telling, however, is the fact that the Supreme Court in a footnote to this statement provided two examples of the principle: EEOC action is not barred by findings and orders of state or local agencies, and an individual's cause of action is not barred by an EEOC finding of no reasonable cause to believe that Title VII had been violated. 415 U.S. at 48, n.8.

We also cannot accept plaintiff's argument on prospectivity based on *Bastiste v. Furnco*. Plaintiff points specifically to our statement in *Batiste* that:

> We must agree with the ruling in *Cooper v. Philip Morris, Inc.*, 464 F.2d 9 (6th Cir. 1972) where the court squarely rejected the application of the doctrines of election of remedies and res judicata to Title VII actions where plaintiffs had litigated their charges to final adjudication in state *proceedings*.

[9] Moreover, arbitration proceedings lack the procedural safeguards available in federal court; there is often no discovery, cross-examination, compulsory process, or testimony under oath, and the federal rules of evidence are not applied. 415 U.S. at 57-58. For these reasons alone, the *Kremer* Court likely would have refused to accord preclusive effect to a state court decision reviewing an agency proceeding of this sort. A state proceeding need not be accorded preclusive effect if the due process clause is not satisfied. 102 S.Ct. at 1898-1899.

503 F.2d at 450 (emphasis supplied). Admittedly there is ambiguity on the face of this statement; "proceedings" could refer either to state *agency* proceedings only or to state *court* proceedings as well. This Court in *Unger* chose to adopt the latter interpretation, but that does not dispose of the question of how Trudy Unger justifiably could have interpreted this language in 1975 when she filed suit in the Circuit Court of Cook County.

In *Batiste v. Furnco*, plaintiff's complaint was dismissed by the FEPC hearing officer. Plaintiff then filed suit in district court under Title VII and § 1981. Subsequently, the full Commission reversed the hearing officer and granted relief. Defendant then appealed to the county Circuit Court, but at the time of the district court decision (and apparently during our consideration as well) the Circuit Court proceeding was "still pending." 503 F.2d at 449. It appears that there was never a state court decision, and indeed the parties argued only about the preclusive effect of the FEPC proceeding (defendant also argued election of remedies). Thus while the language in *Batiste* could be interpreted as including state court judgments under the rubric "proceedings," nothing in the case had anything to do with state court proceedings. The Court probably did not intend that specific construction of its endorsement of *Cooper*; if it did, the language can only be characterized as dictum.

The inference that in *Batiste* we meant to refer only to agency proceedings is strengthened by the fact that we explicitly claimed to be following *Cooper v. Philip Morris, supra*, on the lack of preclusive effect of state proceedings. In that case, plaintiff prevailed before the Kentucky Commission on Human Rights, and then filed a Title VII suit seeking additional relief. Neither party sought recourse to the Kentucky state courts. The district court granted summary judgment for defendant, finding the Commission judgment to be res judicata. The preclusive effect of the agency proceeding was the only issue before the Sixth Circuit, which reversed. *Batiste v. Furnco* thus cannot be characterized as "settled precedent" upon which Unger justifiably could have

relied for the proposition that state *court* judgments do not have collateral estoppel effect for purposes of Title VII suits.[10]

2. *A case of first impression*: Plaintiff Unger has a more plausible argument that *Kremer* is a case of first impression whose outcome was not clearly foreshadowed. As indicated above, *Batiste* and *Alexander* provide no basis for confidence that a plaintiff with an adverse state court judgment would be welcome in federal court. On the other hand, as of 1975 when Trudy Unger filed her state court suit, neither was there any case law saying that such a plaintiff could not bring a Title VII suit. Nevertheless, the Supreme Court's language in *Chevron Oil* still provides difficulties for plaintiff. The phrase "an issue of first impression whose resolution was not clearly foreshadowed" suggests the presence of an issue on which opinion differs and for which the prediction about which way the Supreme Court will turn is unclear. In 1975, when the state trial court was asked to decide this case, one could have guessed that the question of whether Title VII effected a partial repeal of Section 1738 eventually had to be decided one way or the other, but at that time there was no conflict among the circuits in need of resolution. The issue simply had not arisen. It is hard to argue reliance when plaintiff could have done no better than a coin toss in predicting how the Title VII override issue would come out.

At the time *Kremer* was decided, the question of the preclusive effect of state court judgments on Title VII

[10] We also note that the district court provided no analysis of the applicability of these cases as precedent controlling the disposition of *Unger*. In the 4-page Memorandum Order denying defendant's motion to dismiss on res judicata, Judge Roszkowski relied merely on the quotations from *Batiste* and *Cooper* discussed above. Memorandum Order at 3. He concluded: "This court adopts the above mentioned reasoning in *Batiste* in denying defendant's motion for summary judgment." *Id.* at 4. There was no reference to the absence of a state court decision in either case, or indeed to any of their facts.

suits had been considerably sharpened at the Court of Appeals level. The only square conflict between the circuits, however, was between ourselves in *Unger* and the Second in *Kremer* and *Sinicropi v. Nassau Co.*, 601 F.2d 60 (2d Cir.), certiorari denied, 444 U.S. 983 (1979). A common fact pattern was present in these three cases; plaintiff had appealed an adverse state agency decision to the state courts and sought federal relief after losing in state court. The Second Circuit in *Sinicropi* (and the Supreme Court in *Kremer*) also took pains to point out that it was plaintiff who elected to go to state court. After *Sinicropi*, Unger might thus have anticipated that election of remedies, if not res judicata or collateral estoppel, would create problems.

A different fact pattern was found in other cases reaching the Courts of Appeals at about the same time. In *Smouse v. General Electric Company*, 626 F.2d 333 (3d Cir. 1980), it was defendant, not plaintiff, who took the case to state court following a victory for plaintiff at the state agency level; the Third Circuit distinguished *Sinicropi* on this ground, although the panel commented that it would have rejected *Sinicropi* anyway on policy grounds. Similarly, the Eighth Circuit in *Gunther v. Iowa State Mens Reformatory*, 612 F.2d 1079 (8th Cir.), certiorari denied, 466 U.S. 966 (1980), conceded the "normal preclusion" issue but concluded that "it is our view that Title VII has created a 'special circumstance' which warrants an exception to the normal rules of preclusion. This is especially true where plaintiff did not seek state court review, but was forced to defend by [defendant's] appeal." 612 F.2d at 1085.[11]

[11] After *Kremer* it would appear that Title VII cases of the *Smouse* and *Gunther* variety (in which plaintiff had been in state court only because forced to defend) would also have to be dismissed under res judicata or collateral estoppel. Given the Supreme Court's holding that Title VII does not partially repeal § 1738 and any state court decision must therefore be accorded preclusive effect, it should be immaterial whether plaintiff or defendant initiated the state court review. This is indeed the position taken by the Third Circuit in a § 1981 case, *Thelma Davis v. United States Steel Corp.*, 688 F.2d 166 (1982) (en banc).

Thus from the perspective of either 1975 or 1982,[12] in no case reaching the Court of Appeals to which plaintiffs has drawn our attention had a plaintiff other than Trudy Unger been allowed to proceed with a federal Title VII suit after obtaining state court review of an adverse agency determination.

B. *Furtherance of The Rule Adopted*

The applicability of the second criterion—policy—is ambiguous. The new rule is simply that as a matter of comity, federal courts must accord preclusive effect to state court judgments; Title VII does not override Section 1738. Retrospective application can only advance this rule. There is no compelling reason for giving only prospective effect to *Kremer* and allowing one more federal case to proceed to finality in the face of a contrary state decision. On the other hand, the federal trial did proceed and since the duplication in court time has already occurred, that aspect of the preclusion doctrine would not be advanced by retrospective application. However, comity, rather than repose *per se*, was the main focus of *Kremer*. Thus it appears that there is no policy reason to apply *Kremer* prospectively. After *Kremer*, as well as before, the possibility of an unseemly race to judgment between state and federal courts (as occurred in *Unger*) remains.

C. *Substantial Injustice*

On the third criterion—injustice—Unger also does not meet the *Chevron Oil* test. She was not left without a forum in which to pursue her claims. Rather she received a full and fair hearing before an Illinois agency and judicial review by the Illinois Courts. The essence of her injustice/prospectivity argument is that she obtained inconsistent judgments and would prefer to rest on the one in her favor. In applying *Kremer* retrospec-

[12] 1975 was when Unger filed her state court action, and 1982 was when the Supreme Court decided *Kremer*.

tively, it is indeed unfortunate from Unger's point of view, but that is not the same thing as substantial injustice. In sum, when *Unger* is tested against the three *Chevron Oil* criteria, we find that it does not present a case for denying retrospective effect to *Kremer*.

This conclusion is also fully consistent with the Supreme Court's retrospectivity analysis in a recent Fourth Amendment case, *United States v. Johnson*, 102 S.Ct. 2579 (1982). Writing for the majority, Justice Blackmun decried the unprincipled *ad hoc* application of retrospectivity in recent Supreme Court criminal cases. He identified three principles which should guide the retrospective application of a new decision: First, any policy on retrospectivity should be predictable procedurally and not be based on the merits of individual cases; a case-by-case balancing of interests leaves no ground for certainty as to when a case should be applied retrospectively. Second, the theory of judicial review itself requires that the court should apply the law as it is at the time of each case as it appears in turn; the court is not a legislative body that is free to give only prospective effect to its decisions. Third, similarly situated parties should be treated alike, with the ultimate outcome not dependent on the speed with which the cases proceeded through the courts.

Justice Blackmun expressly limited his analysis to Fourth Amendment cases, but his reasoning is certainly relevant in a civil context as well. A decision to deny retrospective effect to *Kremer* would be based not on a principled application of retrospectivity principles, but on the view that as a matter of policy a Title VII plaintiff deserves a federal trial regardless of the state court outcome. This, however, is the policy choice specifically rejected by the Supreme Court in *Kremer*.

V.

For the above reasons, it is our conclusion that *Kremer* controls *Unger*. In the absence of any persuasive reason for denying retrospective effect to *Kremer*, we hold that the *Unger* case should be remanded to the district court with instructions to dismiss the complaint.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

SUPREME COURT OF THE UNITED STATES

CONSOLIDATED FOODS CORPORATION *v.* TRUDY UNGER

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 81-656. Decided June 1, 1982

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *Kremer* v. *Chemical Construction Corp.*, 456 U. S. —— (1982).

JUSTICE BLACKMUN, concurring.

Respondent Trudy Unger filed charges with the Illinois Fair Employment Practices Commission (FEPC) alleging that she had been a victim of sex discrimination in employment. The FEPC ruled against her, but on judicial review the state trial court found that the FEPC's decision was against the manifest weight of the evidence. The Appellate Court of Illinois reversed, concluding that the FEPC's order was not arbitrary, capricious, or an abuse of discretion. *Unger* v. *Sirena Division of Consolidated Foods Corp.*, 60 Ill. App. 3d 840, 845, 377 N.E. 2d 266, 270–271 (1978). The Illinois Supreme Court denied respondent's petition for leave to appeal.

During the pendency of the state proceedings, respondent filed this Title VII suit in the United States District Court for the Northern District of Illinois. Sometime after the Illinois Appellate Court ruled against respondent, the District Court found that she had in fact been a victim of sex discrimination. The United States Court of Appeals for the Seventh Circuit affirmed on this issue. 657 F. 2d 909 (1981).

Following its recent decision in *Kremer* v. *Chemical Construction Corp.*, —— U. S. —— (1982), the Court must

grant, vacate, and remand the case for further consideration. But since the Illinois court professed to apply a deferential standard of review, it is not clear that *Kremer* governs this case. See *id.*, at ——, n. 21; *id.*, at ——, ——, n. 8 (BLACKMUN, J., dissenting). In addition, on remand respondent will be free to argue that *Kremer* should not apply retroactively. See *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971).

If the Court of Appeals concludes that *Kremer* controls this case, it will be forced to order the dismissal of respondent's complaint as barred by the Illinois Appellate Court's affirmance of the FEPC's decision. Only one court, the District Court, has given respondent a full *de novo* hearing, and that court determined that respondent had been discriminated against because of her sex. Yet application of this Court's *Kremer* decision denies her any relief under Title VII, simply because she took the reasonable step of seeking correction of the FEPC's decision in the state courts. As I explained in my *Kremer* dissent, —— U. S., at ——, I cannot accept that this result is consistent with the congressional purpose underlying Title VII—that the fight against employment discrimination be a national policy of the highest priority. Surely all future discrimination victims in respondent's situation should be very careful to avoid the state courts entirely so that those victims will not risk losing the relief that Congress intended Title VII to afford them.

APPENDIX C

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Nos. 80-2792 and 80-2844

TRUDY UNGER,

Plaintiff-Appellee, Counter-Appellant,

v.

CONSOLIDATED FOODS CORPORATION,

Defendant-Appellant, Counter-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 77 C 364 —**J. Sam Perry**, *Judge.*

ARGUED MAY 28, 1981—DECIDED AUGUST 14, 1981

Before SPRECHER, *Circuit Judge,* and MARKEY, *Chief Judge,** and CUDAHY, *Circuit Judge.*

SPRECHER, *Circuit Judge.* This is an appeal and cross-appeal from the district court's judgment that, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., plaintiff was wrongfully terminated from employment because of her sex and in retaliation for filing a complaint with the Illinois Fair Employment Practices

* Honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, is sitting by designation.

Commission ("FEPC") alleging sex discrimination. These appeals present questions as to: 1) the collateral estoppel effect in Title VII actions of prior state proceedings; 2) the sufficiency of the evidence regarding the findings of sex discrimination and retaliatory firing; 3) the proper measure of damages; and 4) the propriety of the district court's judgment denying plaintiff attorneys' fees for her unsuccessful efforts in the state proceedings.

I

Plaintiff, Trudy Unger, was employed from 1962 to October 16, 1972, as a sales representative by Sirena, Inc. ("Sirena") and subsequently, by Consolidated Foods Corporation.[1] Sirena manufactures and distributes women's swimwear. Until her first termination, effective July 31, 1972, plaintiff was the exclusive Sirena sales representative for Illinois, Indiana, Minnesota, Michigan, Wisconsin, and Ohio ("Midwest territory"). As such, she was entitled to commissions on all sales of Sirena swimwear to customers in the Midwest territory. In a letter of May 31, 1972, from Sirena, plaintiff was terminated as sales representative in the Midwest territory effective July 31, 1972. Prior to her termination, plaintiff was the only female sales representative in Sirena's ten year history. She was replaced by John A. (Tony) Herrmann, Jr.; no women were interviewed for her position. On June 30, 1972, plaintiff was rehired by Sirena and was appointed sales representative for Iowa, Nebraska, Kansas, Missouri, and Illinois (excluding Chicago) ("Prairie territory") beginning August 1, 1972.

[1] Sirena, Inc. was acquired by Consolidated Foods Corporation in 1971 and thereafter was operated as a division of Consolidated Foods Corporation. References to Sirena are intended to apply to Sirena Inc. and to the Sirena Division of Consolidated Foods Corporation.

On October 2, 1972, plaintiff filed a charge of sex discrimination, pursuant to the Illinois Fair Employment Practices Act, Ill.Rev.Stat., ch. 48, § 851 et seq., with the FEPC based on her discharge from the Midwest territory. On October 13, 1972, Sirena received notice of the FEPC complaint. On October 13 and October 16, plaintiff received telephone calls from Maurice Newman, Vice President and National Sales Manager of Sirena, and Arnold Seckler, President of Sirena, urging plaintiff to either drop her suit or resign and telling plaintiff the suit would cost her a lot of money and just make the lawyers rich. Plaintiff refused to drop her complaint or resign. On October 16, 1972, Seckler sent plaintiff a letter terminating her employment. On October 27, 1972, plaintiff filed a second claim with the Illinois FEPC asserting that the second termination was in retaliation for filing her first charge.[2]

Plaintiff's state charges were heard before a Hearing Examiner appointed by the FEPC. He recommended to the FEPC a finding in favor of Sirena on the charge of sex discrimination and against Sirena on the charge of retaliatory discharge. The FEPC reviewed the record, reversed the finding of retaliatory discharge, and affirmed the finding of no sex discrimination.

Plaintiff sought review of the FEPC's adverse decision in the Circuit Court of Cook County pursuant to the Illinois Administrative Review Act, Ill.Rev.Stat. ch. 110, § 274 et seq. The Circuit Court concluded that the FEPC's action was contrary to the manifest weight of the evidence, re-

[2] Plaintiff also filed a complaint with the Equal Employment Opportunity Commission ("EEOC") alleging sex discrimination and retaliatory firing. In light of the state proceedings, the EEOC deferred action on the federal charges pursuant to Section 706(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(c).

versed the FEPC's judgment, and found that Sirena' first discharge was discriminatory and the second retaliatory.

Sirena appealed to the Illinois Appellate Court, which reversed the Circuit Court and reinstated the FEPC's findings that the discharges were non-discriminatory and non-retaliatory. *Unger* v. *Sirena Div. of Consol. Foods Corp.*, 60 Ill.App.3d 840, 377 N.E.2d 266 (1978). Plaintiff's Petition for Leave to Appeal to the Illinois Supreme Court was denied.

During the pendency of the Illinois proceedings, plaintiff received a right-to-sue letter from the EEOC and, on February 2, 1977, filed the instant action in the United States District Court for the Northern District of Illinois. Plaintiff alleged discriminatory discharge on the basis of sex in violation of Title VII, 42 U.S.C. § 2000e-2(a)[3] and retaliatory discharge in violation of Title VII, 42 U.S.C. § 2000e-3.[4] A trial de novo was held before Judge Perry, sitting without a jury. At the conclusion of the trial, Judge Perry entered his findings of fact and conclusions of law finding for plaintiff on the issues of sex discrimination and retali-

[3] 42 U.S.C. § 2000e-2(a) provides in pertinent part:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin;

[4] 42 U.S.C. § 2000e-3 provides in pertinent part:

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

atory discharge. The court awarded plaintiff $141,190.82 as back pay and ordered Sirena to pay plaintiff for her costs and attorneys' fees incurred in prosecuting the federal suit.

Sirena appeals from the district court's conclusion that Sirena violated Title VII in discharging plaintiff from either the Midwest or Prairie territories. Plaintiff cross-appeals from the court's judgment limiting back pay to $141,190.82 and barring plaintiff's recovery of costs and attorneys' fees incurred in the state proceedings.

II

Sirena argues that the district court erred in denying its motion for summary judgment. Sirena argues that plaintiff is precluded, under the principles of either collateral estoppel or election of remedies, from relitigating the issue of plaintiff's discharge that was decided adversely to her by the FEPC and the Illinois Appellate Court. We reject Sirena's attempt to undermine the effectiveness and independence of de novo federal judicial review of Title VII claims.

In *Batiste* v. *Furnco Construction Corp.*, 503 F.2d 447, 450 (7th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975), this Circuit "rejected the application of the doctrines of election of remedies and res judicata to Title VII actions where plaintiffs had litigated their charges to final adjudication in state proceedings. There is a strong Congressional policy that plaintiffs not be deprived of their right to resort to the federal courts for adjudication of their federal claims under Title VII." The court reasoned further that "if federal actions are barred by the application of election of remedies and res judicata, then the statutory scheme of deferral to state proceedings will be frustrated by requiring that the plaintiff, who desired to bring an action in federal court,

first commence state proceedings but abandon them quickly before an adjudication is made." *Id.*

Our reasoning in *Batiste* is reinforced by the Supreme Court's analysis in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974). There, the Supreme Court held that the submission of an employee's complaint of racial discrimination to final arbitration pursuant to the non-discrimination clause of a collective-bargaining agreement did not preclude the employee from seeking a trial de novo in federal district court under Title VII. The Court stressed that "federal courts have been assigned plenary powers to secure compliance with Title VII." 415 U.S. at 45. Analyzing Title VII's relationship to other remedies against discrimination, the Court stated that:

> Title VII provides for consideration of employment-discrimination claims in several forums . . . . And, in general, submission of a claim to one forum does not preclude a later submission to another. Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.

415 U.S. at 47-48 (footnotes and citations omitted).

With the exception of the Second Circuit's brief per curiam opinion in *Sinicropi* v. *Nassau County*, 601 F.2d 60 (2nd Cir.), *cert. denied*, 444 U.S. 983 (1979),[5] every court to

[5] Sirena's reliance on *Sinicropi* v. *Nassau County*, 601 F.2d 60 (2nd Cir.), *cert. denied*, 444 U.S. 983 (1979), is misplaced. In *Sinicropi*, the Second Circuit held in a brief per curiam opinion that a Title VII plaintiff, who previously had submitted her claim of sex discrimination to the New York State Division of Human Rights and had thereafter appealed the agency's adverse decision through the New York courts, was precluded by the principles of res judicata from relitigating in federal court her claim of sex dis-

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address the question of the relationship between federal judicial proceedings under Title VII and related state proceedings concerning employment discrimination has used reasoning consistent with our *Batiste* analysis and has refused to give preclusive effect to the state proceedings. *See*

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[5] *continued*

crimination. The court relied solely upon its holding in *Mitchell* v. *National Broadcasting Co.*, 553 F.2d 265 (2nd Cir. 1977), that the principles of res judicata apply to actions under 42 U.S.C. § 1981. In *Sinicropi*, the court, without analysis, concluded that the reasoning for applying res judicata in § 1981 actions was equally applicable to suits under Title VII.

Sinicropi has been vigorously attacked and soundly rejected by other courts. *Smouse* v. *General Electric Co.*, 626 F.2d 333, 336 (3rd Cir. 1980); *Gunther* v. *Iowa State Men's Reformatory*, 612 F.2d 1079, 1083-84 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980); *Kralowec* v. *Prince George's County*, 503 F.Supp. 985, 991-92 (D.Md. 1980). As these decisions clearly demonstrate, *Sinicropi* ignores the fundamental differences between actions under 42 U.S.C. § 1981 and those under the unique statutory structure of Title VII. We join these courts in rejecting *Sinicropi's* attempt to interfere with Title VII's statutory scheme by applying principles of res judicata to prevent plaintiffs from securing a trial de novo in federal court.

Similarly, defendant's reliance on the Supreme Court's recent pronouncement in *Allen* v. *McCurry*, U.S. , 101 S.Ct. 411, 66 L.Ed.2d 308 (1980), regarding the application of res judicata and collateral estoppel to cases under 42 U.S.C. § 1983 is misplaced. In concluding that res judicata and collateral estoppel could bar a plaintiff's federal suit under 42 U.S.C. § 1983 on the basis of prior state proceedings, the Court stressed that the statutory and congressional history of § 1983 does not evidence any intent to deny binding effect to valid state proceedings. 101 S.Ct. at 416-17. That history, however, is in direct contrast to the abundant statutory and legislative evidence that Title VII envisions a dual federal and state enforcement scheme culminating in an independent right to a trial de novo in federal court. *See Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44-47 (1974).

Smouse v. *General Electric Co.*, 626 F.2d 333, 336 (3rd Cir. 1980) (per curiam); *Gunther* v. *Iowa State Men's Reformatory*, 612 F.2d 1079, 1084-85 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980); *Cooper* v. *Philip Morris, Inc.*, 464 F.2d 9, 11-12 (6th Cir. 1972); *Kralowec* v. *Prince George's County*, 503 F.Supp. 985, 990-93 (D.Md. 1980).

Sirena attempts to distinguish *Batiste* and the other cited decisions on the ground that, in those cases, it was not the plaintiff-complainant who had sought state judicial review of the state administrative proceedings. In the present case, however, plaintiff elected to seek state judicial review of the FEPC's decision rather than to immediately pursue her right to seek a trial de novo in federal court pursuant to Title VII. Sirena reasons that plaintiff's decision to pursue state judicial review constitutes an election of remedies and precludes relitigation of the issues involved in the state proceedings.

We find Sirena's distinction to be without significance. Regardless of which party seeks state judicial review of administrative proceedings, foreclosure of Title VII's federal judicial remedy would serve to discourage plaintiffs from fully pursuing state proceedings and would conflict with Title VII's statutory scheme, which encourages resolution of discrimination claims by state authorities while reserving the right to proceed in federal court. Our analysis is consistent with the Supreme Court's in *Gardner-Denver*, 415 U.S. at 49 n.10, that "[t]he policy reasons for rejecting the doctrines of election of remedies and waiver in the context of Title VII are equally applicable to the doctrines of *res judicata* and collateral estoppel."

Sirena argues, alternatively, that if the state proceedings are not given preclusive effect, the district court erred, nevertheless, by failing to give any weight to the findings of the Illinois Appellate Court without articulating any

reasons for rejecting the state proceedings. Sirena argues that *Gardner-Denver*, 415 U.S. at 60 n.21, required the district court to accord very substantial weight to the state court's findings.

Sirena misconstrues the import of the Court's comment in *Gardner-Denver*. The Court clearly recognized Title VII's requirement of a trial de novo on plaintiff's claims of employment discrimination. Although the Court suggested that the trial court could receive the record of state proceedings as evidence to be accorded such weight as the court deems appropriate, the Court also stressed that "courts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum." 415 U.S. at 60 n.21.

In the present litigation, the factual background of the case is largely undisputed. The significant question in this case, and in the numerous, conflicting state proceedings, is the inference of discriminatory intent to be drawn from those facts. This question was specifically a matter for the district court to consider in its trial de novo. The trial court's ultimate legal conclusion that Sirena did discriminate against plaintiff is exactly the type of independent legal analysis contemplated by Title VII. *See Stewart* v. *General Motors Corp.*, 542 F.2d 445, 449 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977). Consequently, the trial court committed no reversible error in its refusal to accord greater weight to the contrary legal conclusions of the state proceedings.[6]

[6] In light of our conclusion that plaintiff's suit is not barred by the prior state proceedings and that the trial court did not err in refusing to accord greater weight to the state proceedings, Sirena's "Renewed Motion to Supplement Record," which was taken with the case at oral argument, is denied.

III

Sirena challenges the sufficiency of the evidence to support the district court's findings of fact and conclusions of law that Sirena violated Title VII. "In reviewing the district court's decision, we are bound under Fed.R.Civ.P. 52(a) to accept findings of fact unless they are clearly erroneous." *Stewart* v. *General Motors Corp.*, 542 F.2d at 449, *citing Prince* v. *Packer Mfg. Co.*, 419 F.2d 34, 36 (7th Cir. 1969).[7] However, "[a] distinction must be drawn between subsidiary facts to which the 'clearly erroneous' standard applies, and the ultimate fact of discrimination within the meaning of Title VII . . . ." *Id.* The latter requires "an independent examination of whether defendant's conduct constitutes a violation of Title VII." *Id.*

A

Sirena challenges the district court's conclusion that Sirena discriminated on the basis of sex in discharging plaintiff as sales representative for the Midwest territory.[8] Sirena does not challenge the trial court's conclusion that plaintiff established a prima facie case of sex discrimination by introducing evidence that plaintiff, the only female sales representative for the Midwest territory and, with

[7] Sirena argues that since the district court adopted plaintiff's proposed findings of fact almost verbatim, except with respect to the measure of damages, we should scrutinize those findings more closely than usual. As stated on numerous other occasions, "[w]e agree that we must review the record carefully in such cases, but emphasize that the 'clearly erroneous' standard still applies." *Canfield* v. *Rapp & Son, Inc.*, No. 80-2836, slip op. at 13 n.8 (7th Cir. July 6, 1981), and cases cited therein.

[8] Sirena first raises a jurisdictional question. It challenges the court's conclusion that plaintiff was an "employee" within the meaning of Title VII rather than an independent contractor not

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[8] *continued*

within the scope of Title VII's coverage. Title VII defines "employee" very broadly to mean "an individual employed by an employer . . . ." 42 U.S.C. § 2000e(f). In determining whether a business relationship is one of employee-employer, courts look to the "economic realities" of the relationship and the degree of control the employer exercises over the alleged employee. *See Spirides* v. *Reinhardt*, 613 F.2d 826, 831-32 (D.C. Cir. 1979). In deciding whether an individual is an employee and, thus, within the scope of Title VII's protections, courts should keep in mind the remedial nature of Title VII and construe it liberally so as to further the goals and purposes of eliminating discrimination in employment. *See Spirides*, 613 F.2d at 831; *Quijano* v. *University Federal Credit Union*, 617 F.2d 129, 131 (5th Cir. 1980).

Sirena does not argue that the district court applied an incorrect standard or that the court's detailed findings outlining the scope and nature of the employment relationship are incorrect. Rather, Sirena argues that the district court's conclusion based on these facts is incorrect and that the court should have given greater significance to plaintiff's contract with Sirena, which referred to her as an "independent contractor."

Sirena's argument reduces itself to a mere disagreement with the court's assessment and balancing of the numerous factors in the employment context. As such, we find it unpersuasive. First, "[c]onsideration of all of the circumstances surrounding the work relationship is essential, and no one factor is determinative." *Spirides*, 613 F.2d at 831 (footnote omitted). Consequently, "although contract language may be indicative to some degree of the intention of the parties, it is not necessarily controlling." *Spirides*, 613 F.2d at 832 (footnote omitted). Thus, although plaintiff's contract was in evidence, its language does not control plaintiff's status under Title VII. Second, the district court, in Finding # 11, listed eleven examples of the ways in which Sirena exercised economic and managerial control over plaintiff, including regular sales reports, payment of some business expenses, regular draws against commissions, plaintiff's exclusive and lengthy representation of Sirena, Sirena's withholding of taxes beginning in 1972, and Sirena's treatment of plaintiff's successor. The district court did not abuse its discretion by weighing these factors and concluding that plaintiff was an "employee" within the meaning of Title VII.

no women being interviewed for her position, was replaced by a man. In addition, plaintiff introduced abundant evidence to show that she had been performing her job for almost a decade without receiving any oral or written criticisms of her job performance and that, in fact, plaintiff's sales record for the Midwest territory far outstripped the rate of growth for Sirena's nationwide sales. Consequently, it is clear that plaintiff carried her burden of establishing a prima facie case of sex discrimination. *See Texas Dept. of Community Affairs* v. *Burdine,* U.S. , 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981); *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 802 (1973).

Sirena's contention is that the court erroneously concluded that Sirena failed to articulate legitimate, nondiscriminatory reasons for plaintiff's discharge and also erroneously concluded that plaintiff proved that Sirena's proffered reasons are pretextual. Sirena offered evidence that plaintiff's discharge was a part of a company-wide sales force reorganization in which five other salespersons, all male, also were terminated. Sirena also offered testimony that plaintiff was being replaced in part because of her inability to adequately service large department store accounts. We need not decide whether, in fact, the court erroneously concluded that Sirena's reasons were inadequate to rebut plaintiff's prima facie case of sex discrimination,[9] for we are convinced that the court found, and

[9] There is some confusion between the district court's conclusion that Sirena failed to articulate any legitimate, nondiscriminatory reasons for plaintiff's discharge and its conclusion that the reasons articulated by Sirena are a mere pretext for a discriminatory discharge on the basis of sex. There has been nearly continuous confusion in the lower courts regarding the proper semantics to employ in describing the respective burdens of proof and production of evidence in Title VII employment discrimination cases. *Compare*

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the evidence supports the finding, that Sirena's reasons are pretextual. *See Sherkow* v. *Wisconsin, Dept. of Public Instruction*, 630 F.2d 498, 503 (7th Cir. 1980).

First, the district court found that plaintiff's termination was unrelated to any alleged sales reorganization. The court's finding that four of the terminated sales representatives were dismissed for evident incompetency or old age was amply demonstrated by sales figures and company documents. The fifth representative, was, like plaintiff, a very successful salesperson whose territory was reorganized. But, unlike plaintiff, he was offered the bulk of his former territory and a protective agreement to maintain his earnings. No such offer was extended to plaintiff. On the basis of these findings, the district court concluded that the sales reorganization was pretextual with respect to plaintiff. We have reviewed the record and do not find the court's analysis to be clearly erroneous.

Second, the court found that plaintiff had never received any oral or written criticisms of her sales performance. Unlike the situation with respect to the other terminated sales representatives, Sirena had no documents critical of plaintiff's sales performance. Indeed, Sirena's records reveal that plaintiff's sales had increased from $20,620 in 1962 to $572,016 for 1972 (2,674%), while Sirena's overall sales

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[9] *continued*

Texas Dept. of Community Affairs v. *Burdine*, U.S. , 101 S.Ct. 1089 (1981), with *Bd. of Trustees of Keene State College* v. *Sweeney*, 439 U.S. 24 (1978), and *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567 (1978). We are convinced that, in light of the trial court's extensive findings of fact discussing the pretextual nature of defendant's proffered reasons, the court properly considered the evidence and did not impermissibly shift the burden of proof to Sirena. *See Burdine*, 101 S.Ct. at 1093 ("ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff").

during that period had only increased from $383,241 to $3,578,826 (833%). Plaintiff had successfully introduced Sirena's swimwear line into almost every major deparement store in the Midwest territory. Two purchasers for major department stores testified that plaintiff was very competent in servicing their needs. In light of this and other evidence, the court concluded that, once again, Sirena's proffered explanation was pretextual. The court's findings are not clearly erroneous.

Plaintiff met and carried her burden of establishing a prima facie case of sex discrimination and of proving that Sirena's proffered reasons were pretextual. The district court properly concluded that Sirena had violated 42 U.S.C. § 2000e-2(a) by discharging plaintiff from the Midwest territory on the basis of her sex.

B

Sirena also challenges the district court's conclusion that, in terminating plaintiff from the Prairie territory, Sirena had retaliated against plaintiff for filing a charge of sex discrimination with the FEPC and, thus, had violated 42 U.S.C. § 2000e-3(a). Sirena does not argue that plaintiff failed to show a prima facie case of retaliation. Rather, Sirena again argues that the court erroneously dismissed its proffered reasons for plaintiff's second termination as pretextual.

Sirena offered two basic reasons justifying its discharge of plaintiff from the Prairie territory. First, Sirena contended that plaintiff's failure to travel outside of Illinois between August 1, 1972 and October 16, 1972, the date of her termination, demonstrated her lack of success and effort on behalf of Sirena. Second, Sirena contended that plaintiff's dismissal was justified because plaintiff and con-

tracted to represent a noncompetitive knit sweater line of Beldoch-Popper in a different territory.

The district court carefully considered Sirena's proffered reasons for plaintiff's dismissal and concluded that they were pretextual. We conclude that the court's findings are not clearly erroneous. There is abundant, and nearly overwhelming, evidence that plaintiff's termination from the Prairie territory was motivated directly and primarily by a desire to retaliate against plaintiff for filing the first charge of sex discrimination with the FEPC. The evidence casts grave doubt upon the validity of Sirena's alleged reasons for dismissal.

First, plaintiff did not receive her show samples from Sirena until September 9, 1972, thus precluding earlier travels. Second, plaintiff had attended Sirena's August sales meeting in Califonria and had made arrangements to show the Sirena line at major buyers' conventions in St. Louis and Chicago in October and November. Third, plaintiff had begun to make sales contracts in the area surrounding Chicago and intended to work outwards through the entire territory after the St. Louis convention. Plaintiff had discussed her travel strategy with officers of Sirena, and they had not objected. Indeed, at the time of her termination, plaintiff's sales in the Prairie territory exceeded the sales for the comparable period of the prior year. Fourth, there is evidence that Sirena knew plaintiff required a second, noncompetitive line in order to survive in the Prairie territory, that Sirena consented to her carrying a second line, that Sirena had been informed by plaintiff of her intention of carrying the Beldoch-Popper line in an adjacent territory, and that Sirena had not objected.[10]

[10] Sirena asserts that the district court erred in denying its request to subpoena and depose the national sales manager of Beldoch-

Finally, in addition to the evidence which casts grave doubt upon the legitimacy of Sirena's reasons, there is overwhelming evidence of a discriminatory motive. Upon first learning of plaintiff's FEPC complaint, Sirena Officials called and harassed plaintiff, urging her to either drop her suit or resign. When plaintiff refused to do either, Sirena immediately terminated her for the alleged insufficiencies in her work. We simply cannot ignore the timing of Sirena's actions or the very transparent reasons given for the termination. Consequently, the district court properly concluded that Sirena had violated 42 U.S.C. § 2000e-3(a).

IV

The first issue on plaintiff's cross-appeal concerns the propriety of the district court's calculation of back pay. The district court, acknowledging its inability to calculate back pay with absolute precision, awarded damages for 1973 through 1980 based on the difference between plaintiff's actual earnings during those years ($44,309.18) and the amount she would have earned absent Sirena's wrongful discrimination, estimated by the court to be $25,000 per year for a total of $200,000. The latter figure was based on plaintiff's estimated average earnings from Sirena for the eight year period 1973-1980, considering plaintiff's sales record, her subsequent sales efforts, and her

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Popper in hopes of impeaching plaintiff's testimony regarding the industry practice of sales representatives carrying noncompetitive lines in adjacent territories. Defendant's request came at the close of evidence of an already protracted trial. The trial court has broad discretion to control the course of litigation and will be reversed only upon a clear showing of abuse of discretion and of prejudice to the right of the moving party. We find neither an abuse of discretion in the denial of defendant's untimely motion, nor, in light of the overwhelming evidence of Sirena's retaliatory motive, any significant prejudice to Sirena.

intervening physical disabilitities. In addition to reducing the $200,000 figure by plaintiff's actual earnings during this period, the court also reduced the award by $14,500 for special expenses plaintiff would have incurred to maintain sales because of intervening physical incapacities of plaintiff. The court also refused to award prejudgment interest or "front pay." Thus, the district court awarded plaintiff $141,190.82 as back pay.

Plaintiff, however, argues that the district court should have calculated the back pay award not on a speculative estimate of plaintiff's earnings, but on the actual earnings of plaintiff's successor in the Midwest territory, Tony Herrmann. Plaintiff introduced evidence that Herrmann's actual earnings after expenses from 1973 through 1980 totalled $387,831.10. If this figure were reduced by plaintiff's actual earnings during 1972-1980 and her special expenses, plaintiff would receive $329,021.92 as back pay. Alternatively, plaintiff argues that a flat $25,000 per year rate fails to take into account plaintiff's regular and consistent increase in earnings over the prior years. Plaintiff not only points to her past sales record and earnings increases, but also relies on Herrmann's actual sales earnings increases as evidence that her income also would have risen during these years. Consequently, plaintiff argues that the court erred in its calculation of back pay.

It is well established that the trial court has broad discretion in awarding back pay and that its method of assessing the amount of back pay will be set aside only for an abuse of discretion. *Skerkow* v. *Wisconsin Dept. of Public Instruction*, 630 F.2d 498, 504 (7th Cir. 1980); *Comacho* v. *Colorado Electronic Technical College, Inc.*, 590 F.2d 887, 888 (10th Cir. 1979); *Waters* v. *Wisconsin Steel Works of Internat'l Harvester Co.*, 502 F.2d 1309, 1321 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976);

Thornton v. *East Texas Motor Freight*, 497 F.2d 416, 421 (6th Cir. 1974).

The district court's findings discuss at length the court's method and reasons for the award of back pay. The court stressed, among other things, tthe highly speculative and personal nature of sales, plaintiff's intervening physical infirmities, and plaintiff's actual sales performance. Although different considerations may be appropriate and within a court's discretion, *see Kamberos* v. *GTE Automatic Electric, Inc.*, 603 F.2d 598, 603 n.6 (7th Cir. 1979); *EEOC* v. *Kallir, Philips, Ross, Inc.*, 420 F.Supp. 919, 923 (S.D.N.Y. 1976), *aff'd*, 599 F.2d 1203 (2nd Cir.), *cert. denied*, 434 U.S. 920 (1977), we find no abuse of discretion in the district court's use of an estimate of plaintiff's sales earnings as opposed to use of her successor's sales record.

Plaintiff also argues that an award of prejudgment interest to compensate for the eight years between her discharge and the district court's judgment was appropriate. "While we would agree that interest on wages due an owing is an available remedy to a plaintiff in a Title VII action, . . . the decision whether or not to award such interest is within the discretion of the trial court." *Taylor* v. *Philips Indus., Inc.*, 593 F.2d 783, 787 (7th Cir. 1979) (citations omitted). We find no abuse of discretion in the district court's denial of prejudgment interest in this case.

V

Plaintiff's second argument on the cross-appeal challenges the district court's denial of attorneys' fees for work done in connection with the state proceedings. Plaintiff argues that in light of *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54 (1980), she is entitled under 42 U.S.C.

§ 2000e-5(k),[11] as the "prevailing party" to recovery of her attorneys' fees, absent special circumstances, *see Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 417 (1978), for all work done in connection with prosecuting this Title VII claim. We agree.

In *New York Gaslight Club*, the Supreme Court held that Section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k), authorized "a federal-court action to recover an award of attorney's fees for work done by the prevailing complainant in state proceedings to which the complainant was referred pursuant to the provisions of Title VII." 447 U.S. at 71. Plaintiff prevailed throughout the state administrative and judicial proceedings on her allegation of race discrimination, which had been referred to the state agency pursuant to 42 U.S.C. § 2000e-5(c). During the pendency of the state judicial appeals, plaintiff filed a federal court action under Title VII. When the state proceedings became final, plaintiff moved in federal court for an award of attorneys' fees for work done in the state and federal proceedings. The district court denied recovery of fees for the state proceedings, and the Second Circuit reversed. The Supreme Court affirmed, in an opinion clearly applicable to the case at bar.

First, the Court determined that Congress intended Section 706(k) to authorize fee awards for work done in administrative as well as judicial proceedings. 447 U.S. at 61. The Court then concluded that the statute did not distinguish between state proceedings and federal proceedings. 447 U.S. at 61-63. The Court then analyzed the purpose

[11] Section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k) states:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

behind § 706(k) in conjunction with the joint state and federal enforcement scheme envisioned by Title VII. The Court noted that:

> Permitting an attorney's fee award to one in respondent's situation furthers this goal [of facilitating the bringing of discrimination complaints], while a contrary rule would force the complainant to bear the costs of mandatory state and local proceedings and thereby would inhibit the enforcement of a meritorious discrimination claim.

447 U.S. at 63. The Court reasoned further that a denial of attorneys' fees for work done in state proceedings would also undermine Title VII's goal of encouraging the resolution of discrimination claims in state proceedings. 447 U.S. at 65. Consequently, the Court held that the plaintiff there was entitled to attorneys' fees for work done in state proceedings.

Sirena attempts to distinguish *New York Gaslight Club* by stressing that here, plaintiff was not a "prevailing party" in the state administrative or judicial proceedings. Sirena's logic is not compelling. First, we agree with the District Court for the District of Columbia that:

> In Title VII litigation "prevailing party" refers to the party who has successfully maintained a claim and does not depend upon the degrees of success at any particular stage of its prosecution.

Marshall v. *Communications Workers of America*, 21 EPD (CCH) ¶ 30,318 at 12,723 (D.D.C. 1979).

Second, we believe the Supreme Court implicitly rejected Sirena's reasoning in *New York Gaslight Club*. In concluding that a Title VII complainant could bring a civil suit in federal court solely to recover attorneys' fees for work in state proceedings wherein complainant had prevailed on the merits, the Court stated:

> It would be anomalous to award fees to the complainant who is unsuccessful or only partially successful in obtaining state or local remedies, but to deny an award to the complainant who is successful in fulfilling Congress' plan that federal policies be vindicated at the state or local level.

447 U.S. at 66. We believe the Court meant that plaintiffs who ultimately prevail in federal court are entitled to recover attorneys' fees for work in state proceedings which Title VII required and encouraged them to pursue, without respect to the success or failure on the merits of the state proceedings. To hold otherwise would discourage resolution of discrimination claims in state proceedings, would be inconsistent with Title VII's scheme of coordinated state and federal enforcement, and would contradict the clear meaning of § 706(k). Consequently, the district court's judgment denying attorneys' fees for work done in state administrative and judicial proceedings is reversed and remanded for a determination of an appropriate award.[12]

VI

For the foregoing reasons, the judgment of the district court finding Sirena liable for violations of Title VII, 42 U.S.C. §§ 2000e-2(a) and 3(a), and awarding plaintiff back pay is affirmed, and the court's ruling denying attorneys' fees for work done in the state proceedings is reversed and remanded. The judgment is

AFFIRMED IN PART
REVERSED AND REMANDED IN PART

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[12] We have reviewed the record and conclude that no "special circumstances" exist that would justify denial of attorneys' fees in this case.

APPENDIX D

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TRUDY UNGER,
Plaintiff,
vs.
CONSOLIDATED FOODS CORPORATION,
Defendant.
No. 77 C 364

JUDGMENT ORDER

This action came on for trial before the court, and the issues having been duly tried, and the court having this day entered simultaneously herewith its Findings of Fact and Conclusions of Law, in accordance therewith

It is ORDERED and ADJUDGED that plaintiff, Trudy Unger, have and recover from defendant, Consolidated Foods Corporation, the sum of $141,190.82 representing damages occasioned to the plaintiff.

It is FURTHER ORDERED that plaintiff, Trudy Unger, have and recover from defendant, Consolidated Foods Corporation, her costs and attorney's fees in this Federal court suit. The court retains jurisdiction of this cause to allow costs and to determine the amount of plaintiff's reasonable attorney's fees and a hearing thereon will be set by the court immediately after the judgment herein becomes final.

ENTER:

J. S. PERRY
Judge

APPENDIX E

IN THE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TRUDY UNGER,

Plaintiff,

vs.

CONSOLIDTED FOODS CORPORATION,

Defendant.

No. 77 C 364

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action came on for trial before the court, sitting without a jury, and the court, having heard the testimony of the witnesses, weighed its credibility, considered the exhibits, and all the evidence in the case, and now being fully advised in the premises, makes the following findings of fact and conclusions of law:

Findings of Fact

1. Plaintiff, Trudy Unger ("plaintiff" or "Unger"), is a woman who was employed by Sirena, Inc. ("Sirena") and, subsequently, by Consolidated Foods Corporation, as a sales representative for the sale of women's swimsuits from August 13, 1962 through October 16, 1972.

2. Defendant, Consolidated Foods Corporation, was organized under the laws of the State of Maryland and does business in Illinois and other states and has more than 15 employees.

3. Consolidated Foods Corporation ("Consolidated") acquired Sirena, Inc., a manufacturer of women's swimsuits

in 1971 when it became a division of Consolidated Foods Corporation. The reference to "Sirena" covers both the period when Sirena was a separate corporation as well as the activities of Consolidated Foods Corporation through its Sirena division after the acquisition.

4. Arnold Seckler was the principal owner of Sirena at the time of its acquisition, had formed the Sirena corporation, and remained its President both before and after its acquisition.

5. At all pertinent times, Maurice B. Newman, also known as Corky Newman, served as Vice President and National Sales Manager of Sirena.

6. The Equal Employment Opportunity Commission, which had deferred its charge, Charge No. TCH 3-1736, to the Illinois Fair Employment Practices Commission pending hearings therein, issued its right-to-sue letter on November 3, 1976.

7. Unger worked for Sirena from August 13, 1963 through May 31, 1972 as sales representative for the sale of women's swimsuits. She was exclusive representative in the territory comprising Illinois, Indiana, Minnesota, Michigan, and Wisconsin. Later in 1966, Ohio was added to her territory. This territory is hereinafter referred to as the "Midwest" territory.

8. In a letter of May 31, 1972 from Arnold Seckler, Unger was terminated from the Midwest territory effective July 31, 1972.

9. Unger was replaced by a man, John A. Herrmann, Jr., also known as Tony Herrmann. No woman was interviewed.

10. After conversations with Arnold Seckler, Unger was rehired and reappointed to a territory comprising Iowa,

Nebraska, Kansas, Missouri, and Illinois (outside of Chicago), by a letter of appointment dated June 30, 1972. This territory will hereinafter be referred to as the "Prairie" territory.

11. Throughout Unger's employment, Sirena exercised economic and managerial control over her job, as evidenced by the following.

A. Sirena restricted Unger's work to a geographical territory.

B. Sirena required Unger to attend sales meetings and follow sales bulletins.

C. Sirena required Unger to report to the company about sales progress on a weekly basis.

D. During her period of employment, Unger reported regularly and directly to Arnold Seckler, President, or, beginning in 1971, directly to Corky Newman, Vice President and National Sales Manager.

E. Sirena paid part of Unger's expenses for the showroom.

F. Sirena paid Unger's costs of attending sales meetings.

G. Unger received draws against her commission from the company rising to $2250.00 per month in the sales year ending June 30, 1972.

H. Beginning in 1970, Unger dropped all other lines and became exclusive representative for Sirena.

I. Beginning in June 1972 Sirena took deductions for withholding for Federal Income Tax and Social Security.

J. In June 1972 Unger was also promised insurance and profit sharing benefits.

K. Tony Herrmann, who replaced Unger in the Midwest territory, performed the same duties as Unger and was placed on regular payroll status with $400

per week salary, subject to withholding and social security deductions, $400 draw against commissions, and with the title of Vice President.

12. Unger's employment record and the record of Sirena shows that when Unger began work with Sirena, it was a very small company. From the comparative standpoint:

A. From 1965 through 1972 Unger's sales, according to company records, increased from $20,620.00 per year to $572,016.00 per year.

B. During the same period, 1965 through 1972, the sales of Sirena increased from $383,241.00 to $4,578,826.00.

C. In the same period of time, Unger increased the sales in her territory to 27 times while the company increased its total sales by only 10 times.

D. Unger's share of the total business of the company during the same period increased from 3.6% to 8.36%.

13. The only standard for performance given by Sirena to Unger was in 1966 when Seckler projected that the business in the Midwest territory would rise to "$250,000.00 in a few years." In that year, the Unger sales were $37,275.00 in her territory. In the third sales year thereafter (1969) she had increased the sales to $339,498.00, exceeding the company's standard by $89,000.00. Two years later, in 1971, Unger had doubled the $250,000.00 standard reaching sales of $514,900.00.

14. During all of the years of Unger's employment, defendant employed 26 different sales representatives but Unger was the only woman sales representative of Sirena. No women were interviewed either when she was replaced in the Midwest territory or in the Prairie territory.

15. Unger, the only woman territorial representative, was originally employed in 1963 by Seckler. This does not

indicate any lack of discrimination inasmuch as, at that time, the company had difficulty attracting qualified representatives.

16. Unger introduced the Sirena line to the Midwest and developed the territory for Sirena.

A. Unger opened substantially all major department store accounts in the Midwest except Strouss Hirschberg. However, she booked orders for that company in 1972.

B. The correspondence between Arnold Seckler and Trudy Unger and the company records trace the development of the large department store sales in the Midwest territory.

17. Despite the constant flow of communication between Unger, Seckler and Newman, Unger never received any oral or written criticism of her sales ability during the nine years she worked the Midwest territory for Sirena.

A. In his testimony, Seckler admitted that he had never given any oral or written criticism to Unger.

B. The letters from Arnold Seckler to Trudy Unger record only compliments as to her sales ability.

C. Although the minutes of Sirena's Executive Committee meetings specifically record the sales inadequacies of Burgy, Gorrel, and Gorel, they are silent about Unger.

D. The only evidence of prior criticism of Unger's work comes from Corky Newman's deposition.

E. Newman's testimony lacks credibility.

(1) Newman's testimony is biased and inconsistent with documentary evidence and testimony.

(2) Despite his words, in March, 1972 Newman entrusted Unger with a sales seminar he was obliged to conduct at the major department store, J. L. Hudson, in Detroit, Michigan.

F. John Dodge of Carson, Pirie, Scott & Company and Dorothy Green of Chas. A. Stevens presented the only independent testimony on sales ability which was free from interest or bias. According to these witnesses who were familiar with the work of both Unger and Herrmann, Unger very competently managed large department store accounts.

18. The New York showroom existed to service the buyers of large department stores who went to New York for a central buying location and Unger properly used the New York showroom.

19. In the termination letter of May 31, 1972, Seckler stated the reason for the termination of Unger as a corporate reorganization.

20. In the conversations that followed that termination between Seckler and Unger, Seckler specifically said sales had nothing to do with the termination.

21. Seckler now asserts that Unger was also terminated for inability to sell large department stores. The evidence does not support that assertion.

22. Unger's termination did not stem from a corporate reorganization. Defendant claims that the discharge of five sales representatives, all of whom are men, is evidence of a corporate reorganization and lack of discrimination in the Unger discharge. The defendant failed to show any relationship between the discharge of the five representatives and the claim of corporate reorganization. The five male representatives discharged were Harry Copeland, Cy Martin, Robert Burgy, Earl Gorel, and Howard Gorrel. There was no relationship between these discharges and the claim of reorganization or the Unger discharge for the following reasons:

A. According to the testimony of defendant's witnesses as well as the sales figures and notations in

the Executive Minutes, the sales representatives Burgy, Earl Gorel, and Howard Gorrel were admittedly incompetent and discharged for incompetency. There was no evidence of Unger's incompetency.

B. The testimony discloses that Copeland was in his mid-70's and many years beyond retirement and had told the company that he wanted to retire both for age and for physical impairment. Unger was 52 years of age and had not indicated any desire to retire.

C. Cy Martin, the representative in California, carried other lines and, in 1971, his territory was reorganized with certain of his accounts assigned to Weinstock, who had joined the company as Vice President. Martin was given the opportunity to work with Weinstock and did for that sales year. Martin finally decided that he did not want to work under those conditions and left the company. Unger was given no consideration in retaining her territory under any changed conditions.

D. Other than the testimony of Newman and Seckler, no background was supplied as to the termination of the five representatives and no documentation was introduced by the defendant pertaining thereto. The Court finds it difficult to believe that there was no documentary evidence pertaining to five terminations.

23. After Unger's original discharge from the Midwest territory and her rehiring to the Prairie territory, a letter confirming that fact was sent to her by Seckler. Dolores Tessendorf, a member of the Executive Committee of Sirena, was employed at the home office and also served as secretary to Seckler. After typing the original termination letter for Seckler, Dolores Tessendorf typed the rehiring letter for Seckler. She also sent her own note with the rehiring letter stating: Maybe it's not *JUST* a man's world after *all.*" In addition, Arnold Seckler made a statement in the presence of the manager of his shipping department in discussing Unger's performance that "Maybe a man would do a better job in that territory." These statements

reflect the attitudes of Sirena toward the continued employment of a woman as sales representative.

24. On October 2, 1972, Unger filed a charge of sex discrimination with the Illinois Fair Employment Practices Commission. This charge related to her discharge from the Midwest territory by defendant.

25. On Friday, October 13, 1972, Sirena received notice of the charge of discrimination.

26. On the same day that the notice was received, Corky Newman called Unger to discuss the charge. He wanted to know how she could be suing the company and still work for it. He also told her to return her samples contrary to the provisions of her contract as representative for the Prairie territory.

27. On Monday, October 16, 1972, Unger spoke with Seckler over the telephone. Seckler told her she was making a mistake by filing the charge of discrimination and asked her to drop the charge. He also insisted that it would "cost her a lot of money" and the "only ones who would get rich were the lawyers." He advised her that Consolidated Foods had "a lot of lawyers sitting around doing nothing." That same day, Seckler sent Unger a letter of termination.

28. Unger was replaced in the Prairie territory by a man, Earl Baird. No woman was interviewed.

29. On October 27, 1972 Unger filed a second claim with the Illinois Employment Practices Commission asserting that the second termination was a retaliation for her first charge.

30. On November 3, 1976 while the state proceedings were pending on review, the Equal Employment Opportunity Commission issued its right to sue letter to Unger and this action was filed on February 2, 1977.

31. The reasons given by Sirena for the discharge of October 16, 1972 are without basis, inconsistent, and contradictory.

32. In the termination letter of October 16, 1972, Seckler stated the reason for the termination as: "You have not made a single trip to Kansas, Nebraska, Iowa or Missouri with our 1973 line." Prior to that date, in September, Unger had fully disclosed to Newman her plans for handling the Prairie territory in the following manner:

A. Appropriate efforts to add a second line as required by the substantially reduced compensation in the second territory. Seckler admitted that a second line was necessary to support the sales representative.

B. Arrangements to take space at the St. Louis apparel show in October 1972 with opportunity to make direct contact with buyers from all parts of the Prairie territory who would be expected to attend that show.

C. Following the St. Louis apparel show, she would proceed out into the various states of the territory from St. Louis.

D. Arrangements to take space at the apparel show market at McCormick Place in November 1972 with the opportunity to make direct contact with buyers at the show.

E. Travel throughout the state of Illinois which held a substantial part of the business in the new territory.

No objection was made by Newman to those plans and no termination letter resulted therefrom. It was only after news of the filing of the original complaint for discrimination that action was taken. The Court concludes that the facts do not support that the assertion that the termination was because Unger had not made a trip to Kansas, Nebraska, Iowa or Missouri prior to October 16, 1972.

33. Although it was never stated in the letter, Seckler in his testimony said that the primary reason for the termination was Unger's carrying of a knitwear line in an adjacent territory. Seckler referred to the fact that Unger had made arrangements to take on a non-competitive sweater line with Beldoch-Popper. The territory included Illinois, Wisconsin, Michigan, and the part of Indiana between Indianapolis and South Bend. Thus, the territory overlapped the Sirena territory in Illinois and was adjacent territory in the other areas. The evidence does not support the conclusion that the carrying of the Beldoch-Popper line in overlapping territory was a violation of Unger's contract for the following reasons:

A. Unger's letter contract for the Prairie territory, drafted by Sirena, and dated June 30, 1972 prohibited Unger only from carrying a competitive line. It was silent on the question of any conflict in territories. A sweater line is not competitive and is sold at a different season. The only language on the contract on the subject was: "We understand that you are carrying non-competitive lines at the present time and we acknowledge the same; however, if you take on a competitive line, we will consider this a breach of the agreement."

B. During the period of her work for Sirena according to a letter from Seckler and the testimony, Unger had carried knitwear lines which were non-competitive in adjacent territories without objection from Sirena.

C. By mid-September, Newman had been informed that Unger had taken the Beldoch-Popper line in the over-lapping territory. He made no written or oral objection thereto and it was only after the filing of the FEPC complaint that Unger was terminated.

D. No reference was made in the termination letter to any complaint about taking on the Beldoch-Popper line in an over-lapping territory.

34. Unger properly conducted her work in the Prairie territory.

A. In August 1972, Unger attended the sale meeting in California.

B. In August and September she contracted for space in McCormick Place for the Chicago market and for space for the St. Louis market, making the necessary cash deposits.

C. During those months, she spent time making arrangements to find and contract to carry a second non-competitive line to supplement her substantially lower income in the Prairie territory.

D. A sales representative cannot sell until he or she receives samples. Unger did not receive her samples until September 9, 1972.

E. After receiving her samples and observing the Jewish holiday of Yom Kippur, Unger started her swing through Illinois.

F. Newman had been informed of Unger's travel plans and made no objection.

G. By October 13, 1972, Unger's sales exceeded the sales of Earl Gorrel in the Prairie territory for the preceeding year.

35. Due to the terminations of May 31, 1972 and October 16, 1972 Unger lost earnings from the Midwest territory and the Prairie territory between 1972 and 1980.

36. Although Unger was unable to carry sample cases for six weeks in 1974, 26 weeks in 1975, and 26 weeks in 1976, the evidence shows that it would cost $250.00 per week to hire someone to carry the bags for her based upon her earlier experience at Sirena.

37. Unger's disability was a partial, not a total, disability.

38. It also appears from the evidence that plaintiff suffered a fractured ankle in January, 1977, had it surgically corrected in February, 1978, and had physical therapy until November, 1978.

39. After her termination from Sirena, Unger held other jobs from 1973 through 1980, including: New Issues, Marbella; Can't Miss, Added Dimensions; National Jewish Hospital; and American Invsco.

40. Plaintiff was a victim of discrimination and she is entitled to a back pay award to compensate her for her economic loss. The court has to make a conscientious effort to calculate a reasonable and equitable award to make plaintiff whole under conditions which do not allow for absolute precision and it must attempt to make a reasonable award based on available data. Her back pay should be governed by equitable considerations and limited to her actual damages.

Plaintiff has urged the court to calculate back pay based first upon the amount plaintiff calculates was earned by plaintiff's replacement, John A. Herrman, Jr., for the period 1973-1980 in the amount of $387,831.10, and then to deduct therefrom plaintiff's actual earnings during the eight-year period in the amount of $44,309.18, and the expenses plaintiff figures would have been required for additional help during the 58-week period between 1974 and 1976 when Unger was unable to carry sample cases due to a parital back disability in the amount of $14,500.00, for a total back pay award of $329,021.92.

The court finds that an appropriate formula for determining plaintiff's back pay entitlement is the difference between her actual earnings for the period 1973-1980, or eight years, and those she would have earned absent the discrimination. However, the court cannot, as plaintiff urges, equate her potential earnings in the 1973-1980 period

with the commissions earned by John Herrmann, her replacement, based on total sales reported by the company for the years 1973-1980, minus Herrmann's costs and expenses as calculated by plaintiff. The evidence shows that Herrmann had, in the company's opinion, a "remarkable" sales record, especially with large store accounts. The court cannot speculate that plaintiff would have developed sales to the extent that Herrman did, although in the years 1965-1972, Unger's sales for Sirena had steadily increased; and if she had not been discharged, she would have had the opportunity to demonstrate her sales ability. However, to use Herrmann's earnings as a basis would call for an assumption that plaintiff would have had the same amount of commissions and that she would have had the same amount of costs and expenses; and, further, such a calculation would not take into account those periods when plaintiff would have been handicapped in her travelling and selling efforts by physical disabilities. The court instead finds it would be more equitable to look to the evidence of her earnings before the loss of her initial territory and to consider her potential earnings under her circumstances had she continued in her initial territory.

Absolute precision in ascertaining plaintiff's loss under the circumstances cannot be expected and the court can only arrive at a reasonable award based on available data. In evidence are the income tax returns of plaintiff for several years. She reported the following net profit from her work as a sales representative for wholesale ladies apparel (including Sirena and other apparel lines) on Schedule C of her United States Income Tax returns as $7,022.70 in 1968; $15,360.00 in 1969, $14,564.00 in 1970. It appears from her 1971 return that in that year she was a sales representative for Sirena only and was not representing other lines. In 1971, plaintiff reported gross income from Sirena, Inc. of $34,921.00; rent reimbursement from Sirena

of $1,200.00, and sublease of a portion of offices, for a total of $37,021.00, from which she deducted business expenses in the sum of $14,493.00, leaving a net profit of $22,528 from her work as a sales representative. Her 1972 return shows she had a 1099 statement from Sierna for $24,392.00; a 1099 statement from Belloch-Popper, Inc. for $1,379.00; and other items of business income to bring her total business income to $27,371.00, from which she deducted $15,563.00 for business expenses, leaving net profit from her work as a sales representative for wholesale ladies apparel at $11,808. On her 1973 return, Trudy Unger showed her business income as $4,003.00 with deductions of $15,113.00, for a loss of income of $11,110. To her return was also attached a W-2 form from New Issues apparel for $15,709.00. In 1974, she reported commissions of $338.00 from Added Dimensions and $335.00 in commissions for Marbella Knits, for a total of $673.00 in commissions from which she deducted $2,649.00 in expenses, leaving a $1,976.00, and also attached was a W-2 statement showing $1,178.00 from New Issues apparel for $1,178.00. On the 1974 return she also noted: "My previous business offices were at 318 W. Adams which was [sic] totally destroyed by explosion August 1973. Since that time I was out of business but attempted to engage in activies sales apparel with no success. However, back injury also curtailed activities." Plaintiff's 1975 return shows receipts of Trudy Unger Assoc. as $1,374.00 from which she deducted $908.00 in deductions, leaving her a $466 net on Schedule C. By July 1976, plaintiff was working as a fund raiser for the National Jewish Hospital and she later became a real estate sales representative on commission. Plaintiff did make reasonable efforts to find replacement lines of apparel after her discharge and there was not a failure on her part to mitigate damages.

In attempting to ascertain the amount of commissions plaintiff could have earned from Sirena, the court has considered her sales record with Sirena prior to her discharge, her income as a sales representative for others in subsequent years, and those periods in which she might have earned commissions from Sirena had she attempted to obtain "additional services" which she claims would have enabled her to continue travelling and selling during periods of disability. Based on all the evidence in this case, the court finds that if her potential earnings from Sirena in the eight years were averaged out, Trudy Unger could have reasonably earned $25,000.00 a year as a sales representative for the Sirena Division of Consolidated Foods Corporation, or a total of $200,000.00 in the eight-year period. The court finds this amount to be fair, reasonable and equitable. In mitigation of damages, plaintiff's earnings from other employment during the eight years should be deducted. The court finds these earnings to be $13,285.53 in 1973; $1,127.19 in 1974; zero in 1975; $4,154.11 in 1976; $902.15 in 1977; $520.00 in 1978; $6,677.00 in 1979; and $17,643.50 in 1980, for a total of $44,309.18 in earnings from other employment during the years in question. Although plaintiff did not make an attempt to obtain "additional services" during the period of her back disability, the court accepts plaintiff's argument that she could have done so had she continued as a sales representative for Sirena, and, further, finds that plaintiff's estimate of the costs of these services at $14,500.00 is reasonable. The $44,309.18 in earnings plus the $14,500.00 in special expenses total $58,809.18, and this last figure deducted from $200,000.00 leaves Unger's loss at $141,190.82 as a result of Sirena's discriminatory discharge, exclusive of any interest and attorney's fees.

41. Plaintiff also urges the court to retain jurisdiction of this case for the purpose of making a yearly front pay

award calculated by plaintiff from 1981 through the year 1993 as $1,369,083.73 and she also seeks prejudment interest and attorney's fees and costs. The court finds plaintiff's request for a front pay award is inappropriate. Front pay is employed to prevent a recalcitrant defendant from delaying the remedial process and is used to compensate a plaintiff until he or she is given a chance to fill a future vacancy. In this case plaintiff has not requested reinstatement and the evidence indicates plaintiff has decided to discontinue selling wearing apparel. The court cannot accept under the circumstances the assumption that she would have continued selling Sirena swimwear from 1981 until 1993 at the age of 70. Such a front pay award would be highly speculative and unwarranted. Further plaintiff chose to relitigate her claims in the Federal court after losing in the Illinois Appellate Court under Illinois law. The defendant has litigated the matter in this court in good faith. Under the circumstances, plaintiff is entitled to an equitable award for past economic injury to the date of this judgment and not to a front pay award.

42. While the award of prejudment interest is an available remedy to a plaintiff in a Title VII action, the decision whether or not to award it is within the discretion of the trial court; and under the circumstances of this case, the court does not find prejudment interest warranted and that to assess prejudment interest against defendant would be inequitable. The court finds the defendant has not been recalcitrant and has relitigated the case in this court in good faith.

43. The court finds plaintiff is entitled to her costs of action and to reasonable attorney's fees in this Federal court suit. The court retains jurisdiction to determine the amount of attorney's and to allow costs and a hearing thereon will be set by the court immediately after the judgment herein becomes final.

44. Inasmuch as plaintiff has been awarded damages for the initial discharge, there is no reason to calculate damages on the retaliatory discharge other than costs or attorney's fees pertaining thereto. Such costs and attorney's fees pertaining to the retaliatory discharge will be included in the allowance of attorney's fees and costs herein.

Conclusions of Law

1. Plaintiff, Trudy Unger, is an employee within the meaning of Title VII of the Civil Rights Act of 1964.

2. Defendant, Consolidated Foods Corporation, is an employer within the terms of Title VII of the Civil Rights Act of 1964.

3. The court has jurisdiction over this action.

4. Sirena's discharge of Unger from the Midwest territory by letter of May 31, 1972 was a discriminatory discharge on the basis of sex in violation of Title VII, 42 USCA § 2000e-2(a), in that:

A. Plaintiff made a *prima facie* case of sex discrimination by showing, to a preponderance of the evidence:

(1) A discriminatory motive on the part of defendant in discharging plaintiff.

(2) That defendant treated plaintiff less favorably because of her sex.

B. Defendant failed to articulate legitimate nondiscriminatory reasons for that termination.

C. The reasons articulated by the defendant are mere pretext for a discriminatory discharge on the basis of sex.

5. Sirena's discharge of Unger from the Prairie territory by the letter of October 16, 1972 was a retaliatory

discharge in violation of Title VII, 42 USCA § 2000e-3, in that:

A. Plaintiff made a *prima facie* case of retaliation by showing, to a preponderance of the evidence:

(1) defendant's action in challenging plaintiff's rights to make the initial claim of discrimination on the day that defendant learned of the filing of the claim;

(2) defendant's further assertion seeking to persuade plaintiff to withdraw the claim on the following business day;

(3) plaintiff's refusal to back down; and

(4) defendant's summary discharge of plaintiff on the same day, October 16, 1972.

B. Defendant failed to articulate any legitimate, non-discriminatory reasons for the discharge of October 16, 1972.

C. The reasons articulated by the defendant are mere pretext for such discharge.

6. The defendant, having terminated the employment of plaintiff without cause on the initial discharge, and on the basis of sex discrimination, should compensate the plaintiff Unger for the loss of that job by an award of back pay, attorney's fees and costs.

7. The calculation of damages based on the initial discharge is as follows:

A. The back pay award due plaintiff is calculated on the basis of Unger's loss of earnings from Sirena based on the loss of her initial territory for the period 1973 through 1980, less actual earnings by Unger during this period, less the expenses of additional help during the 58-week period between 1974 and 1976 when Unger was unable to carry sample cases due to a partial back disability, calculated as follows:

Court's Finding of Loss of Earnings	$200,000.00
Less: Total Actual Earnings by Unger (1973-1980)	—44,309.18
Less: Total Expense for Additional Help (1974-1976)	—14,500.00
Total Damages	$141,190.82

B. Plaintiff is entitled to her costs of action and to reasonable attorney's fees in this Federal court suit. The court retains jurisdiction to determine the amount of attorney's fees and to allow costs and a hearing thereon will be set by the court immediately after the judgment herein becomes final.

8. Inasmuch as plaintiff has been awarded damages for the initial discharge, the court concludes there is no reason to calculate damages on the retaliatory discharge other than costs or attorney's fees pertaining thereto and such costs and attorney's fees will be included in the allowance of plaintiff's attorney's fees and costs herein.

As separate Judgment Order is being entered herein in accordance with these Findings of Fact and Concluions of Law of the court and simultaneously herewith.

ENTER:

J. S. Perry
Judge

Dated: Dec. 2, 1980

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 77 C 364

TRUDY UNGER,

Plaintiff,

v.

CONSOLIDATED FOODS CORPORATION,

Defendant.

ORDER

This cause comes before the court on defendant's motion for summary judgment. For the reasons set forth below, that motion is denied.

The jurisdiction of this court is invoked under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. The amount in controversy exceeds the sum of Ten Thousand Dollars ($10,000.00), exclusive of interest and costs.

This matter arises from two charges against defendant, Consolidated Foods Corporation, filed by plaintiff, Trudy Unger, with the Illinois Fair Employment Practices Commission (FEPC). Plaintiff was employed by defendant Consolidated Foods Corporation, Sirena Division, as a sales representative. In the first charge, plaintiff alleged that her termination by Consolidated in May, 1972 was due to sex discrimination. In the second charge, plaintiff alleged that after she was rehired by Consolidated and assigned to a new sales territory, she was discharged in October, 1972 in retaliation for filing the initial charge with the commission.

Hearings were held before a hearing examiner who submitted a recommended decision to the commission. The examiner recommended dismissal of the first charge, but found the second discharge was a retaliatory measure. After hearing arguments, the commission ordered dismissal of both charges. Plaintiff brought an action in the circuit court which held that the commission's findings were against the manifest weight of the evidence. Consolidated appealed. The Appellate Court held that the Commission's decision was not against the manifest weight of the evidence. It, therefore, reinstated the Commission's order.

Pending the resolution of the above proceedings, a notice of right to sue was issued to plaintiff by the Equal Employment Opportunity Commission. Plaintiff brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2.

Defendant has moved, pursuant to Rule 56, Federal Rules of Civil Procedure, for summary judgment. Defendant argues that the doctrine of res judicata is a complete defense to this action as a result of the final decision entered by the Illinois Appellate Court in *Trudy Unger* v. *Sirena Division of Consolidated Foods,* 60 Ill.App.3d 840, 377 N.E.2d 266 (1978).

Plaintiff, on the other hand, denies that the doctrine of res judicata bars her from bringing this suit under Title VII in federal court. Plaintiff argues that the doctrine of res judicata does not bar her claim under Title VII on the ground that she had previously litigated her charges in state proceedings. Plaintiff bases her argument upon the Seventh Circuit Court of Appeals decision in *Batiste* v. *Furnco Construction Corporation,* 503 F.2d 447 (7th Cir. 1973).

In *Batiste,* the United States District Court granted plaintiffs' motion for summary judgment, relying on the determination of the Illinois Fair Employment Prac-

tices Commission ordering defendant to cease and desist. See *Batiste* v. *Furnco Construction Corporation,* 350 F.Supp. 10 (N.D. Ill. 1972). In reversing this decision, the Seventh Circuit Court of Appeals held that the doctrine of res judicata was not applicable to bar claims under Title VII of the Civil Rights Act of 1964 on the ground that plaintiffs had litigated their charges in state proceedings, and that the federal courts must conduct their own inquiry into claimed discriminatory employment practices. The court noted a strong Congressional policy that plaintiffs not be deprived of their right to resort to the federal courts for adjudication of their federal claims under Title VII. The court agreed with the ruling in *Cooper* v. *Philip Morris, Inc.,* 464 F.2d 9 (6th Cir. 1972), where the court squarely rejected the application of the doctrines of election of remedies and res judicata to Title VII actions where plaintiffs had litigated their charges to final adjudication in state proceedings.

This court adopts the above mentioned reasoning in *Batiste* in denying defendant's motion for summary judgment. The fact that plaintiff Unger litigated her charges in state proceedings does not bar her from bringing suit under Title VII in this court. In addition, therefore, defendant's affirmative defense of res judicata is stricken.

In any type of litigation, the standard for granting summary judgment is strict. The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that he is entitled to judgment as a matter of law. *Weinberger* v. *Hynson, Wescott & Dunning,* 412 U.S. 609, 93 S.Ct. 2469 (1973). Moreover, any inferences to be drawn from the underlying facts of the case must be viewed in the light most favorable to the party opposing the motion. *United States* v. *Diebold, Inc.,* 369 U.S. 654, 82 S.Ct. 993 (1962).

After considering all of the facts presented, and viewing them in the light most favorable to the non-moving party, it is clear that a genuine issue of material fact exists. That issue is whether plaintiff's discharge from defendant's employment was discriminatory. Since res judicata is not applicable, and a material issue of fact exists, defendant's motion for summary judgment is denied.

ENTER:

/s/ Stanley J. Roszkowski
Stanley J. Roszkowski, Judge
United States District Court

Entered March 10, 1980

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TRUDY UNGER,

Plaintiff,

vs.

CONSOLIDATED FOODS CORPORATION,

Defendant.

No. 77 C 364

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO STRIKE AND MOTION TO STAY

• • • •

III. IN THE INTEREST OF JUDICIAL ECONOMY AN ORDER SHOULD BE ENTERED STAYING FEDERAL PROCEEDINGS PENDING THE OUTCOME OF THE APPEAL IN STATE COURT INVOLVING THE SAME MATTERS ALLEGED IN THE COMPLAINT FILED WITH THIS COURT.

As set forth earlier in this memorandum, the same matters raised in this proceeding are presently pending on appeal in the Illinois Court of Appeals. Defendant, in making its Motion to Stay, recognizes that state court proceedings are not a bar to Title VII suits, *Batiste* v. *Furnco Construction Corporation*, 503 F.2d 447 (1974), *cert. denied*, 420 U.S. 928 (1974). Defendant, however, does not seek a bar to these proceedings. A stay is sought because it ensures the most efficient and economical use of this court's time.

Federal courts have an inherent power to stay proceedings "to maximize the efficient utilization of judicial re-

sources." 5 Wright & Miller, *Federal Practice and Procedure: Civil*, Section 1360, p. 637 (1969). In *Landis* v. *North American Company*, 299 U.S. 248, 254-55 (1936), Mr. Justice Cardozo stated:

> ". . . the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance . . . ."

See also, Keroteot Manufacturing Co. v. *C-O-Two Fire Equipment Company*, 342 U.S. 180 (1952); *Gavlik Construction Company* v. *H. F. Campbell Company*, 526 F.2d 777, 784 (3rd Cir. 1975); *Dellinger* v. *Mitchell*, 442 F.2d 782, 786 (D.C. Circuit 1971); *United States Pipe and Foundry Company* v. *Woodward Iron Company*, 321 F.2d 98, 100 (4th Cir. 1963); *Pet Milk Company* v. *Ritter*, 323 F.2d 586, 587 (10th Cir. 1963) (*per curiam*). While these cases all involve stays of federal proceedings pending determination of the same issues in a parallel federal court action or an arbitration proceeding, the same principle of judicial economy is also applicable in the instant case.

The *Landis, supra*, rationale has been applied in situations involving concurrent state and federal proceedings. *Aetna State Bank* v. *Altheimer*, 430 F.2d 750 (7th Cir. 1970); *Amdur* v. *Lizars*, 372 F.2d 103, 106-07 (4th Cir. 1967); *Mottolese* v. *Kaufman*, 176 F.2d 301, 303 (2d Cir. 1949). In *Mottolese*, a shareholders derivative suit, Judge Learned Hand found the District Court had discretionary power to stay its proceedings pending state court determination of the parties' claims. Judge Hand's opinion, in part, was based upon the judicial economy argument in *Landis*. 176 F.2d at 303.

In *Aetna State Bank* v. *Altheimer, supra*, the Seventh Circuit upheld the District Court's decision to grant the

defendant's motion in abatement construing the lower courts ruling to be a stay of federal proceedings pending the final outcome of the state court action. 430 F.2d at 756, 758. The plaintiff had filed a claim against the defendant in state court alleging a violation of the Uniform Commercial Code of Illinois. Four months later, plaintiff filed an action in federal court alleging a violation of 10 b-5 of the Securities Exchange Act of 1934, 15 U.S.C. Section 78j(b).

Citing *Landis, supra,* the Seventh Circuit stressed at 430 F.2d 755-56, that power to stay proceedings enabled courts:

> ". . . to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel and for litigants."

The Court then found that:

> ". . . (a) stay pending the outcome of the litigation in another court between the same parties, involving the same or controlling issues is an acceptable means of avoiding unnecessary duplication of judicial machinery . . . .
>
> • • •
>
> "While . . . a federal court is not required to abate the normal *in personam* action on a plea of a pending action in state court . . . it is within the discretionary power of the district court to stay its proceedings pending the completion of state proceedings . . . .
>
> • • •
>
> "We need cite no cases nor set forth any statistics on the obvious fact of the ever increasing work load on our courts, both state and federal. It is a salutary doctrine in our opinion which permits, when the same issues and same parties are involved in two courts, even though those courts have concurrent jurisdiction, one court to have the discretion to direct by an

appropriate stay order that the litigation be confined to one forum."

This court, in keeping with the law of the Seventh Circuit, should exercise its discretion to stay federal proceedings pending the outcome of the state court litigation.

Defendant maintains that this duplicate litigation places unnecessary burdens upon both the courts and the parties. Parties to the state and federal actions are identical. Both suits are brought on the basis of the same allegedly discriminatory act. Substantially, the same questions of fact and legal issues will be litigated at the state and federal levels. In addition, any relief awarded to the Plaintiff in a state court is essentially equivalent to the remedies available in federal courts. Finally, the state proceeding, currently in the court of appeals, is much closer to completion than the federal action. In the interest of Judicial economy, the Defendant submits, this federal action must be stayed until the parallel state proceedings are concluded.

CONCLUSION

On the basis of the authority cited the Defendant submits that its Motion to Strike and Motion to Stay be granted.

Respectfully submitted,

CONSOLIDATED FOODS CORPORATION

By .....
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APPENDIX H

STATE OF ILLINOIS

FAIR EMPLOYMENT PRACTICES COMMISSION

IN THE MATTER OF:

TRUDY UNGER,

Complainant,

- and -

SIRENA DIVISION OF CONSOLIDATED FOODS CORPORATION,

Respondent.

CHARGE NO. 72C-1136
72C-1197

RECOMMENDED ORDER AND DECISION

DANIEL S. SHULMAN, Hearing Examiner, pursuant to Section 8 (f) of the Fair Employment Practices Act (hereinafter referred to as the "Act") and Article III, Section 3.8 of the Rules and Regulations under the Act, as amended, submits to the Fair Employment Practices Commission (hereinafter referred to as the "Commission") the following as his Recommended Order and Decision in this cause:

I.

ALLEGED VIOLATIONS OF THE ACT

On October 2, 1972, the Complainant, TRUDY UNGER, (hereinafter referred to as "Complainant") filed a charge with the Commission (Charge No. 72 C-1136) which alleged that Respondent, SIRENA DIVISION OF CONSOLIDATED FOODS CORPORATION, (hereinafter referred to as "Respondent" or "Company") had committed an unfair employment practice as defined in Section 3 of the Act by terminating Complainant as a Sales Representative for Respondent. The text of the charge reads as follows:

"Monday, July 31, 1972, I was unjustly replaced in a high paying sales territory by a newly, hired salesman.

"On or about June 5, 1972, by letter I was informed of my termination effective July 31, 1972. On June 19, 1972, Mr. Newman (Sales Manager) stated that because of the reorganization of sales staff, my territory would be covered by three salesmen. However, on August 21, 1972, at a sales meeting I found out that only one male, John A. (Tony) Herrmann, had replaced me in my territory.

"Because of the aforementioned discriminatory act, I feel that my relocation was due to my sex, female, and to the fact that I am the only woman in this type of sales representative position.

"I seek reinstatement to my former location and territory, full back wages with all lost commission, equal treatment and the cessation of all unfair employment practices against females."

On October 26, 1972, a second charge was filed by Complainant against Respondent alleging that Respondent had taken retaliatory action against Complainant for the filing of the first charge. The text of this charge (73C-1197) is as follows:

"A. On October 18, 1972, after Consolidated Foods received advice of the complaint filed with the Commission, No. 72C-1136, I received advice from Arnold Seckler, President of Sirena, Division of Consolidated Foods, in writing that my employment had been terminated. Consolidated had no cause for such termination and such termination was in fact reprisal for the above complaint and in violation of Section 3(d) of the Act.

"B. On October 22, 1972, I received telephoned advice from Arnold Seckler that unless the complaint before the Commission (No. 72C-1136) was withdrawn, there would be a suit for breach of contract

filed against me; that Consolidated had lots of lawyers on its payroll and such a suit would not cost them anything; that such a suit would cost me a great deal of money; that I should drop the whole matter. This action was a threat to discriminate in violation of Section 3(d) of the Act."

An investigation was conducted by the Commission, and it was determined that substantial evidence of an unfair employment practice existed. Thereafter, on April 27, 1973, a complaint of unfair employment practice was issued in Cases 72C-1197 and 72C-1136. Respondent was served by certified mail on April 30, 1973. Thereafter, Respondent filed a motion to dismiss the Complaint, which Motion was denied by the Hearing Examiner in an Order dated June 12, 1973. (A copy of this Order is attached as Appendix A to this Decision). On June 27, 1973, the Respondent filed its answer to the complaint, in which it denied committing unfair employment practices. Subsequently, public hearings were held on June 12, 1973, June 26, 1973, July 19, 1973, August 3, 1973, August 8, 1973, and August 9, 1973. Thereafter, Briefs were filed, and the parties agreed that the Hearing Examiner's Opinion would be rendered no later than January 4, 1974.

II.

CONTENTIONS OF THE PARTIES

A. The Complainant.

The Complainant contends that the Company was guilty of discrimination on the basis of sex when it discharged Complainant on July 31, 1972. Complainant notes that she was the only female sales representative of the Company, and that she was replaced by a man. Further, Complainant argues that the Company's alleged economic justifications for replacing Complainant were unsupported by the record, and that the record shows that Complainant was a competent sales representative.

The Complainant further contends that her discharge on October 16 was in retaliation for her filing of the original FEPC charge on October 2nd. Complainant states that immediately upon becoming apprised of the filing of the original charge, a representative of the Company phoned Complainant on Friday, October 13, 1972, and questioned her about the charge. At that time, it was suggested that Complainant should resign. Further, on the following Monday, October 16th, additional retaliatory threats were made by Company personnel, and on the same day, a letter was sent to Complainant discharging her. Complainant contends that the stated reasons for the discharge, namely her non-performance of her job, were not supported by the evidence and were mere after-thoughts to justify the discharge action.

Additionally, Complainant contends that she was an "employee" within the definition of the Act at all times herein. Complainant asserted that Complainant was subject to the direction of Company personnel, and that she followed the directions she was given. Further, Complainant points out that detailed policy statements were given to salesmen, and that in 1972, salesmen were considered as employees for purposes of the income tax laws, and W-2 forms were prepared accordingly. Complainant also states that she was required to report directly to responsible officials of the Company. Finally, the Complainant argues that the Act is broadly structured and includes in its definition of "employee" any person who performs "services for remuneration" for an employer. Complainant contends that she fulfilled the requirements of this definition during her entire relationship with the Company..

B. The Respondent.

The Respondent initially contends that the Fair Employment Practices Commission does not have jurisdiction over this matter because Complainant is an independent contractor and, therefore, not an "employee" cov-

ered by the Act. Respondent states that Complainant had total freedom over the manner and means of the performance of her duty. Further, it is asserted that Complainant was never supervised by Respondent as to the expenses and manner and mode of operation. It is noted that Respondent could sell other non-competitive lines, and that she filed an income tax return which showed that she was the sole proprietor of a business called Trudy Unger & Associates, engaged in the business of selling wholesale ladies apparel.

Respondent further contends that even if Complainant were an "employee," she was not treated differently from any other sales representative. Respondent notes that Complainant has the burden of proving disparate treatment on the basis of sex in order to establish a claim of unlawful discrimination, and asserts that there was absolutely no evidence that Complainant was treated any differently than any other salesman. The Respondent notes that in addition to Complainant, five male salesmen were terminated during this period by the Company, and that the Company had economic reasons for all of these actions. The Respondent further states that even if Complainant can show disparate treatment, there has been no evidence that disparate treatment was motivated by Complainant's sex, and, therefore, there is no basis for sustaining an unfair employment practices charge.

In regard to the termination of October, 1972, Respondent asserts that this action was motivated solely by business reasons, specifically by Complainant's refusal to perform her duties for the Company. Respondent claims that prior to this termination, Complainant had been warned several times, and when she continued to refuse to perform her duties, she was terminated.

The Respondent also states that the unfair employment practice complained of in the original case (72C-1136) took place on May 31, 1972, and that Complainant

did not file a charge with the Commission until October 2, 1972, four days after the statutory 120 day period had elapsed. Respondent asserts that, accordingly, the Commission does not have jurisdiction over the allegations contained in the original case (72C-1136), and that said complaint must be dismissed. Further, Respondent argues that the second case (72C-1197) must be dismissed since no violation of Section 3(d) of the Act can exist since the previous charge was not properly filed.

Finally, the Respondent contends that the charge in the second case (72C-1197) was not issued and served within the 180 day period required by statute, and, therefore, the Commission has lost jurisdiction over this charge.

III.

ISSUES

A. Substantive Issues.

1. Did the Complainant establish by a preponderance of evidence that sex was a factor in her discharge of June, 1972?

2. Did the Complainant establish by a preponderance of evidence that the discharge of October, 1972, was in retaliation for her previous filing of an unfair employment practice charge?

B. Jurisdictional Issues.

1. Was Complainant an independent contractor or an employee within the meaning of the Fair Employment Practices Act?

2. Was the charge in Case 72C-1136 filed within the statutory period of limitation?

3. Does the Commission have jurisdiction over the charges in Case 72C-1197?

IV.

STATEMENT OF FACTS

A. The Respondent.

The Respondent, SIRENA DIVISION OF CONSOLIDATED FOODS CORPORATION, is a manufacturer of women's swimwear. These products are sold under the Sirena tradename to retail outlets by sales representatives who are assigned exclusive rights in various geographical territories. During the periods involved in this action, Complainant was the only female sales representative of the Company. (TR 307) However, three of the seven members of the Sirena Executive Board were women, and the Company also employed female sales personnel in its New York office. (TR. 307, 604, 605)

B. Complainant.

The Complainant, TRUDY UNGER, entered into a written contract with the Company in August, 1963. By the terms of this contract, Complainant agreed to act as sales representative for the Sirena line within a territory comprising Illinois, Indiana, Minnesota and Wisconsin. The Company agreed to pay Complainant a commission equal to 7% of the net sales within this territory. Complainant was responsible for all travel and selling expenses which she incurred. Further, Complainant was permitted to act as a sales representative for other, non-competitive lines. (C. Ex. 2)

In the course of her business, Complainant maintained a bank account under the name "Trudy Unger & Associates" and filed an income tax return as a self-employed individual, operating the sole proprietorship of Trudy Unger Associates. (C. Ex. 47, 52) In 1965, Ohio was added to Complainant's territory. (TR. 49)

C. Sales Procedures.

In order to sell the Company's products, Complainant would contact various retail outlets within her territory. In contacting these stores, Complainant operated relatively independently. She would set her own schedule, call on the customers she selected, and decide when and where to travel within the territory. She was directly responsible for all expenses which she incurred. (TR. 259, 260)

Complainant would make a report to the Company every week or two. These reports were made by telephone and, until 1970, were directed to Arnold Seckler, the President of the Sirena Division. (TR. 62) In 1970, Maurice Newman was put in charge of all salesmen east of the Mississippi River, and Complainant, therefore, made her reports to him. (TR. 64, 261)

Further, various types of written communications would be sent between Complainant and the Company, including memoranda, periodic reports of commission earnings, and weekly reports of sales. (TR. 65-67) Complainant would also call the Company from time to time regarding such matters as shipping and delivery problems. (TR. 64, 65, 261)

Complainant received commissions on all sales that were made to stores within her territory. Sales could be made in any one of several ways. First, Complainant could write a sale while she was visiting a store within her territory. Second, customers who had been previously contacted by Complainant could call the New York or California showrooms and place their orders with Company personnel at these locations. (TR. 458, 893) Third, two or three times a year, the Company would pay for Complainant to go to New York and California. (TR. 65) While there, Complainant would see customers from her territory who had come to New York and California to place their orders. (TR. 459, 742, 743) Finally, Company personnel at the New York and

California showrooms would, on occasion, see Complainant's customers and take their orders for swimwear. (TR. 744, 965)

D. Complainant's Work Record.

Between the years ending June 30, 1965, and June 30, 1972, Complainant's net sales increased over twenty-six times, from $20,620.00 to $572,016.00. (C. Ex. 64) During the same period, Company sales increased nearly twelve times, from $383,241.00 to $4,578,826.00. (C. Ex. 65)

Company witnesses testified that during the last few years, there has been a shift in the Company sales emphasis. The Company was now concentrating on making sales to large department stores, rather than small specialty stops. (TR. 525) Additionally, there was testimony that Complainant had failed to adapt her sales techniques and procedures to adequately service the large department store account. (TR. 344-347) Newman testified that he talked to Complainant about the necessity for changing the way she wrote department store orders. (TR. 342) However, Complainant did not change her procedures.

There was further testimony by Company witnesses that the Company was dissatisfied with Complainant's sales volume in her territory It was asserted that the Company's competitors were doing better in the area.

Finally, Complainant was allegedly criticized because the New York office was bearing too much of the burden of servicing Complainant's accounts. (TR. 470, 472, 540)

Criticisms directed against Complainant were not put in written form, and, in fact, the written memoranda up to 1972 often praised Complainant's performance. (TR. 280, 281, 344) (C. Ex. 13, 15, 16) Complainant denies that before May 23, 1972, she was criticized for these matters or that she was aware of any criticism about

her sales performance. (TR. 70, 71, 976, 1056, 1057) Complainant states that the only Company projections of dollar sales volume applicable to her territory was contained in a note from Seckler in 1966 in which he stated that it was his belief that Complainant's "territory will yield $250,000.00 in a few years." (C. Ex. 15) Complainant's sales totals for the year ending June 30, 1969, was $339,498.00. (C. Ex. 64)

Finally, Complainant denies that she was criticized for over using the New York office and denies that she did, in fact, use the facilities more than the other sales representatives. (TR. 734, 893)

E. Company Reorganizes Sales Force.

Starting in 1970, the Company undertook a reorganization of its sales force. During the next two and one-half years, six of the eight sales representatives, including Complainant, were terminated. The other five terminated sales representatives were men. During this period, eight new representatives were hired, as well as three new vice-presidents. In addition, two of the old territories were divided. (TR. 473-489) (R. Ex. 2)

The Company testified that the reorganization was motivated by the Company's desire to increase the volume of sales to large department stores. (TR. 485)

F. Termination of July 31, 1972.

On May 23, 1972, Newman informed Complainant by phone that her services would no longer be required by the Company. (TR. 104) At this time, Newman also told Complainant that she was not performing her job adequately. (TR. 104) Complainant testified that this was the first time that she had heard such criticism. (TR. 105)

On June 5, 1872, Complainant received a letter dated May 30, 1972, which terminated Complainant's relationship with the Company as of July 31, 1972. (C. Ex. 6)

Following receipt of the termination letter, Complainant talked to Seckler and asked him to reconsider. (TR. 122) Late in Jone, Complainant talked to Newman and was told that a territory comprising Iowa, Kansas, Missouri, Nebraska and Illinois (excluding Chicago) was available. (TR. 126, 550) Complainant expressed an interest in obtaining this territory. (TR. 129) The territory itself, as regards dollar volume, was much smaller than the one to which Complainant had previously been assigned. Complainant's old territory had a sales volume of over half a million dollars. (C. Ex. 64) In her discussions with Newman concerning the sales volume in the new territory, the figure $250,000 was used. Newman stated this figure referred to the potential of the territory, while Complainant testified that the figure was allegedly the current sales volume of this territory. (TR. 129, 361, 552) Complainant was also told that if she was assigned to this new territory, she would be covered by the Company's major medical plan and participate in the profit sharing program. (TR. 129, 130)

On June 30, 1972, Seckler wrote to Complainant and appointed her the sales representative for the 1973 season in the new territory. As in the past, Complainant was to receive full commission on all the sales made to customers in her territory. Further, she was again responsible for her selling expenses. The Complainant was still entitled to handle non-competing lines. The agreement was terminable upon thirty days written notice. (C. Ex. 22)

After receiving the appointment letter, Complainant called Seckler and asked why no mention was made of the major medical or profit sharing benefits. (TR. 132, 133) Seckler replied that it would be done. Newman subsequently told Complainant that in order for her to be entitled to these benefits, it would be necessary for her to be put on the payroll. (TR. 135) On August 1, 1972, Complainant was put on the Company's payroll. (TR. 135, 136, 207)

After her termination on July 31, 1972, Complainant testified that she thought that her original territory would be divided up among three other salesmen. There had, in fact, been talk about dividing her territory in the past. (TR. 144, 525, 691-693) However, rather than divide the territory, most of Complainant's old territory was assigned to one salesman, John Anthony Herrmann.

On August 21, 1972, the Company introduced its new line to the sales representatives at a meeting in California. (TR. 130, 1123) Company witnesses testified that following the introduction of the new line, it was important for salesmen to go out into the territory to get orders for the winter cruise season. In this regard, September sales were said to be important, since delivery of later orders could not be guaranteed by January, which is the peak of the cruise season. (TR. 573-584)

Complainant testified that in order to reduce her travel expenses, she had planned to contact the accounts in her territory closest to Chicago first. Later she would move to those that were farther away from Chicago. Further, Complainant states that she made plans to show her merchandise at the St. Louis and Chicago shows. Complainant states that Newman was aware of these arrangements and had not expressed any dissatisfaction. (TR. 158-162, 1123)

Newman, *on the other hand,* stated that during the month of September, he talked to Complainant several times about the necessity for getting out and traveling the territory, but that Complainant did not seem too interested in getting out and selling. (TR. 557, 570) Complainant did complain about her previous dismissal and the fact that her new territory was not as good as the old one. She told Newman that she needed other lines, and that she needed money to travel. (TR. 558) Respondent arranged to advance Complainant travel money of $350.00 per month. Further, Newman gave Complainant the names of three companies that she might

call to obtain a second line, but Complainant made no serious effort to contact any of these companies. (TR. 556, 557)

On September 12th and 15th, Newman testified that he again talked to Complainant and urged her to start traveling. (TR. 571) Newman states that he pointed out to Complainant that she had not contacted some of the biggest stores in her territory. (TR. 572) Complainant responded that she was only going to travel within a 50 to 75 mile radius of Chicago at first, and that she would not call on many of the stores until late October or November. (TR. 573) Newman told her that this would be too late to make delivery for the cruise season. (TR. 574, 575)

Newman testified that he talked to a Mr. Earl Baird on September 13, 1972, about the possibility of becoming sales representative for Complainant's territory. (TR. 585, 586, 667) (R. Ex. 13) Newman said that he had this conversation with Baird because he felt Complainant was not going to perform her duties. (TR. 586, 587)

In a later phone conversation between Newman and Complainant, Newman stated that he again told her that she would have to go out into the territory. Newman asserted that the Complainant was doing no better than her predecessor, who had been dismissed for poor performance. (TR. 363, 364) However, Complainant points out that as of October 13, 1972, her sales in the new territory were $21,062.00. The previous year, Complainant's predecessor had recorded sales during this period of $13,974.00 in a territory which was the same as Complainant's, except that it did not include any part of Illinois. (C. Ex. 66) During this same period ending October 13, 1972, Herrmann had recorded sales of $32,790.00 in a territory which was the same as Complainant's original territory, except that it excluded Illinois outside of Chicago. The previous year, Complainant had recorded sales of $72,902.00 during this period. (C. Ex. 70) It is

undisputed that at no time did Newman warn Complainant that she would be discharged if she did not go out into the territory. (TR. 362, 1123, 1124)

G. The October Termination.

In September, 1972, Complainant testified that she became aware of information which indicated that the Respondent had arranged for John Herrmann to replace her in her old territory much earlier than she had originally been told. (TR. 198) (C. Ex. 37) Thereafter, on October 2, 1972, Complainant filed a complaint in Case No. 72C-1136, alleging that the Company discriminated against her on the basis of sex when it took her old territory away from her and replaced her with Herrmann.

Also during this time, Complainant completed arrangements with another company, Belldoch-Popper, in which Complainant was appointed sales representative in a territory comprising Illinois, Wisconsin, northern Indiana and Michigan. (TR. 158, 234, 235) Under that Agreement, she was to receive a commission on all sales made in October and full territorial rights starting November 1, 1972. The Belldoch-Popper line was a non-competing line. (TR. 288)

In the last week of September or the first week of October, Newman learned of Complainant's arrangement with Belldoch-Popper. He testified that he felt it confirmed his suspicion that Complainant was not interested in working the territory she had been assigned by Respondent. (TR. 591, 707) Newman testified that another sales representative had a line in an adjacent territory. (TR. 596, 597)

Newman testified that by the first week in October, he had decided that Complainant would have to be replaced. (TR. 708, 709)

The Company received notification of the charge Complainant had filed in Case No. 72C-1136 on October 13,

1972. (TR. 592) On that same day, Newman called Complainant and asked her about the "suit" that she had filed. (TR. 593) Complainant told him that it was not a suit, but a complaint. (TR. 594) Newman testified that during this conversation, he again stressed the necessity for having Complainant travel the territory, and stated that she wasn't fulfilling her obligations. Complainant testified that during the conversation, Newman stated that "any body who is suing the company can't be working for the company at the same time," and suggested that Complainant resign. (TR. 165) Complainant then said that she could not talk further because a customer was in the Office, and Newman told her that if she did not call back by 2:30 that afternoon, he would consider it her resignation. (TR. 167, 594)

Newman testified that he talked to Complainant a second time on the 13th, and that during that second conversation, he again expressed displeasure with Complainant's performance, and particularly with the fact that she had taken an adjacent territory for the Belldoch-Popper Company. (TR. 595) Complainant states that she did not talk to Newman again that day, but reached him on Monday, the 16th, and informed him that she did not intend to resign. (TR. 167) Newman then informed Complainant that she was being terminated. (TR. 169, 598) Later that day, Complainant testified that she talked to Seckler. Complainant testified that during this conversation, Seckler questioned Complainant about the complaint she filed with the Commission. (TR. 173, 174) He advised her against taking this step and said that it would cost her money in lawyer's fees. Seckler tried to persuade Complainant to drop her complaint. Complainant stated that he also threatened legal action on the part of the Company against Complainant for her failure to live up to her responsibilities under the Sales Representation Agreement. (TR. 174)

Complainant stated that she told Seckler that the reason that she filed a complaint was because she had previously been told that she was going to be replaced by three sales representatives, and, in fact, only one man had replaced her. (TR. 176) Seckler denied that there had been any unfairness to Complainant and stated that "we knew what your sex was for ten years." (TR. 176)

Later that day, Seckler wrote to Complainant and informed her that she had been terminated. The reason stated for the termination was her failure to make a trip to the Kansas, Nebraska, Missouri and Iowa territories with the 1973 line. Complainant was told to return her samples immediately to New York. (C. Ex. 27)

V.

RECOMMENDED ORDER AND DECISION

Charge in Case 72C-1136

The Complainant initially filed a basic charge claiming that she was discharged because of her sex. The Respondent, in addition to generally denying this charge, has also raised certain jurisdictional defenses. Thus, the Hearing Examiner is called upon to deal with both jurisdictional issues, as well as substantive issues.

Normally, one must deal with the jurisdictional issues first. In this connection, let us examine these jurisdictional issues.

First, Respondent claims that the alleged unfair employment practice occurred on May 31, 1972, the day the letter of termination was written, and that Complainant did not file a charge until October 2, 1972, 124 days later. The statute in effect at that time required the filing of a charge within 120 days after an unfair employment practice had been committed. The Respondent, therefore, concludes that since the charge was filed late, the Commission had no jurisdiction over the claim. Assuming that the amendment to the statute which allowed 180

days for the filing of a charge, and which went into effect on October 1, 1972, was not retroactive, is this defense valid? In the first instance, the Respondent's defense ignores the fact that notice to the Complainant did not occur until June 5, 1972. Further, the Respondent's defense ignores the fact that the actual discharge from the territory occurred on July 31, 1972, the date the termination was effective. Apart from whatever cause of action might have arisen from the date the decision to terminate was made or communicated, there is no question that the actual discharge itself would give rise to a cause of action if same were discriminatory. Therefore, the Hearing Examiner finds that the statute did not begin to run until July 31, 1972, the effective date of the discharge from the territory. Accordingly, Complainant's charge was filed within the statutory period, and the defense is rejected.

The second jurisdictional defense raised by the Company is that the Complainant was an independent contractor rather than an employee within the meaning of the Act. As regards the employment relationship between Complainant and the Company prior to the first discharge effective July 31, 1972, the Respondent has urged that the test to be applied in determining whether an employer-employee relationship exists is the same test utilized under the National Labor Relations Act. This test, known as the "means" test, examines whether the employer has control over the means used by the employee to achieve the desired ends. The Complainant, on the other hand, urges that the instant Act is much broader and defines employee as "any person who provides services for remuneration" for an employer. The Hearing Examiner does not decide this issue as to the first charge, inasmuch as an examination of the merits of the case requires the conclusion that the first charge must be dismissed.

In the first instance, Complainant has presented evidence to show that she is a competent sales representa-

tive. This evidence establishes beyond dispute that Complainant took a very small dollar volume territory and built up a substantial business. However, this factor alone does not support her charge that her discharge was motivated by sex bias. The Complainant has the burden of proving that the Company was guilty of this unfair employment practice. However, an examination of the record shows that the Complainant did not sustain her burden of proof.

Five male sales representatives had also been terminated by the Company during this period. Complainant has not shown that she was treated any differently from these people during this general reorganization by the Company. In fact, of the six terminated sales representatives, apparently only Complainant was given another territory following her termination. In addition, it is significant that Complainant replaced a male sales representative in that new territory.

At the hearing, Complainant produced memoranda written to her by Company personnel that referred in one way or another to her sex. These memoranda, several of which were written by women executives of the Company, make *isolated* references to the fact that Complainant is a woman, however, the Hearing Examiner does not find any inference of discrimination from them.

Complainant considers it significant that, although the Company employed several women executives, Complainant was the only female sales representatives that the Company ever had. This factor, on balance, is not an indication that Complainant was terminated because of her sex. As Seckler observed to Complainant, "We knew what your sex was for ten years." What the Complainant is, in effect, urging is that if a company employs a single female in a position, it may never remove her from that position. This position, of course, is rejected by the Hearing Examiner.

In sum, it may be true that after ten years of service, the Complainant was not even given the traditional gold watch.. In addition, the discharge of Complainant may not turn out to have been an astute business move by the Company. However, the Act does not protect a party in these circumstances absent evidence of proscribed discrimination. The Hearing Examiner finds that such evidence has not been presented in this case. Therefore, it is recommended that the charge in Case No. 72C-1136 be dismissed.

Charge in Case 72C-1197

Respondent initially makes three collateral attacks on the charge in Case 72C-1197, which charge alleges that Respondent terminated Complainant on October 16, 1972, in retaliation for Complainant's filing a charge in Case 72C-1136.

First, Respondent asserts that the charge in the original case (72C-1136) was not timely filed, and, therefore, the charge in the second case (72C-1197) must be dismissed, since there can be no violation of Section 3(d) of the Act under these circumstances. Since it has already been determined that the original charge in 72-C-1136 was filed well within the statutory period, this argument is rejected. In addition, although not raised as a defense, the validity of the charge in 72C-1197 would in no way be adversely affected by a finding that Complainant was an independent contractor prior to her discharge from the territory on July 31, 1972, inasmuch as the Act proscribes retaliation against any person who, in good faith, files a charge irrespective of their employment status.

Second, the Respondent again asserts its independent contractor defense. However, the facts show that a substantial change in the relationship occurred after the Complainant's reappointment as a sales representative. After this time, Complainant was put on the Company payroll, and employee deductions were made from her

paychecks. Further, Complainant was at least promised coverage under the Company's major medical plan and participation in the profit sharing program. Even under the test urged by Respondent, all of these factors are indicative of an employee status.

Moreover, the testimony clearly shows that the Company claimed the right to exert control over the manner and means used by Complainant to accomplish the sales. The Company claimed to have disapproved of Complainant's travel plans and allegedly told her to get out and travel the territory at once. In fact, the Company alleged that the reason Complainant was terminated on October 16, 1972, was because she was not complying with Company directives about traveling the territory and contacting stores.

In light of these factors, the Hearing Examiner finds that the Complainant was an employee within the meaning of the Act as regards Case No. 72C-1197.

Third, the Respondent alleges that while the Act requires the Commission to "issue and serve" a complaint within 180 days after the filing of a charge, the complaint in 72C-1197 was issued 182 days after the filing and served 185 days after the charge. This same defense was maintained in Respondent's Motion to Dismiss, and, for the reasons previously stated in the Hearing Examiner's ruling on this Motion, the defense is rejected.

Turning to the substance of the charge in 72C-1197, Respondent argues that legitimate business reasons existed for the Company's termination of the Complainant, and that these reasons were, in fact, the motivation for the discharge action. In support of this position, Respondent's basic contention is that Complainant had failed to go out to the territory during the month of September, and had indicated that she would not visit customers in some states until November, which was too late to take orders for the "cruise" season.

Further, the Company points out that Complainant had become a representative for a line of clothes in a territory adjacent to the territory assigned by the Company. Newman claimed that such an arrangement would impair Complainant's ability to handle the Company's territory properly. There was some testimony which indicated that when one other salesman had taken on such an adjacent territory, he was immediately discharged.

The Company maintains that it was the failure of Complainant to perform her job, and not the fact that she filed a charge with the Fair Employment Practices Commission, that was the reason for her discharge. Let us examine the entire record on these issues. In the first instance, the record is clear that at no time did the Company ever warn the Complainant that any of her actions would result in discharge. The Company claimed that Complainant had refused to go out into the territory for approximately six weeks, despite repeated urgings by Company officials. In light of the Company's failure to warn Complainant of a possible discharge for her actions, therefore, the timing of the discharge becomes highly suspect to say the least. Parenthetically, the Hearing Examiner notes that Herrmann, who was given substantially the same territory that Complainant previously had, did not do nearly as well as Complainant had done for a like period. Yet, the record was devoid of any evidence that the Company had expressed any dissatisfaction to Herrmann concerning his performance.

Further, the alleged problem created by Complainant's representation of a non-competing line in an adjacent territory is equally suspect. Unlike the other alleged instance where a sales representative was fired immediately for such action, the Company here waited two weeks and only fired Complainant after she had filed a charge with the Commission.

Moreover, the evidence, when taken together with the timing of the discharge, clearly indicates that the Complainant was actually discharged on October 16, 1972, as the result of her having filed a charge with the Commission. First, it is undisputed that on the day the Company became aware of the charge in the original case (72C-1136), Newman telephoned Complainant and questioned her about that charge. The Hearing Examiner credits Complainant's testimony that Newman suggested that Complainant resign since she was "suing" the Company. When Complainant had to attend to a customer, Newman stated that if she did not return the call by 2:30 that afternoon, "I'll consider that you no longer work for us." Newman again talked to Complainant on the following Monday, October 16, 1972, and expressed dissatisfaction with her and referred her to Seckler.

When Complainant talked to Seckler, the President of the Company questioned Complainant about the charge that she had filed and advised her to drop the whole matter. He stated that it would just involve the parties in extended litigation and result in high lawyer's fees. Further, he threatened to file suit against Complainant and stated that, "If we sue you, it's going to cost you a lot of hard earned cash."

The Hearing Examiner finds that these conversations with Company representatives, at the very least, constituted veiled threats of retaliatory action against Complainant if she persisted with her complaint. Having been unsuccessful in these conversations, the Company, that same day, wrote a letter discharging Complainant. The conclusion is inescapable, and the Hearing Examiner finds, that in light of all these circumstances, the discharge was in direct violation of Section 3(d) of the Act.

Accordingly, it is recommended that the Company be directed to re-employ Complainant as a sales repre-

sentative in the new territory which she had been given on June 30, 1972. Further, it is recommended that Complainant be awarded an appropriate amount of money for loss of income from the period of the wrongful discharge on October 16, 1972, until such time as the Company restores her to her former position as a sales representative in the territory comprising Iowa, Nebraska, Missouri, Kansas and Illinois, excluding Chicago. Such back pay should be computed on the basis of the Complainant's commission rate for the actual sales attributed to this territory, less any amounts Complainant may have earned through the sale of competing lines or through other types of employment. The amount that Complainant earned through her work with Belldoch-Popper should not be set off against the amount of back pay to which she may be entitled. If the parties cannot agree on the amount of lost income to which the Complainant is entitled, it is recommended that either party petition the Commission for a back pay hearing for the purpose of making such a determination.

Respectfully submitted,

/s/ Daniel S. Shulman
Daniel S. Shulman
Hearing Examiner

STATE OF ILLINOIS

FAIR EMPLOYMENT PRACTICES COMMISSION

Charge Nos. 72C-1136
72C-1197

In the Matter of

TRUDY UNGER,

Complainant,

and

SIRENA INCORPORATED Division of
CONSOLIDATED FOODS CORPORATION,

Respondent.

ORDER

This cause comes before the Hearing Examiner pursuant to the Respondent's Motion to Dismiss the Complaint in the above matters. The parties have heretofore met before the Hearing Examiner on June 4, 1973, at a pretrial conference, wherein the Respondent's Motion to Dismiss, as well as its Motion to Reschedule the Hearing were discussed.

At the pretrial conference, the Hearing Examiner indicated that he would issue a ruling on Respondent's Motion to Dismiss on or about June 12, 1973, and that the Hearing would open on that date. However, while the Hearing would open for purposes of complying with the statute, the matter would be adjourned and rescheduled at an early date convenient to all parties.

As regards Respondent's Motion to Dismiss, it has set forth six alleged bases to dismiss the Complaint. Accordingly, this Order will treat each individual ground, as follows:

1. Paragraph 1 of the Respondent's Motion sets forth that the Respondent does not employ twenty-five (25) or more employees within the State of Illinois and, accordingly, is not an employer within the meaning of

the Act. The Fair Employment Practices Commission has made an administrative determination that the employer is an employer within the meaning of the Act, however, such administrative determination does not preclude the Respondent from raising this defense at the trial of the cause. Inasmuch as this defense is evidentiary in nature, as well as the fact that there should be a full opportunity for cross-examination, the Hearing Examiner cannot sustain this defense in a Motion to Dismiss. Accordingly, the first alleged ground is hereby denied. The Respondent, however, is not precluded from raising same as an affirmative defense in a subsequent responsive pleading.

2. Paragraph 2 of Respondent's Motion, in substance, alleges that the Complainant is, in fact, an "independent contractor." This defense is also evidentiary in nature and should be subject to a full opportunity for cross-examination. The Hearing Examiner cannot sustain this defense in a Motion to Dismiss, and, accordingly, said defense is denied. However, it should be noted that the Respondent is not precluded from raising this matter by way of an affirmative defense in a responsive pleading and offering evidence on same in the trial of the cause.

3. Paragraph 3 of the Respondent's Motion alleges that the alleged act of discrimination in Case No. 72C-1136 took place on May 31, 1972, and more than 120 days prior to the filing of the Charge. An examination of the pleadings indicates that the alleged act of discrimination in Case No. 72C-1136 is alleged to have taken place on July 31, 1972, and not on May 31, 1972, and, accordingly, is within the time limitations set forth in the statute (see Paragraph 3 of the Complaint and Paragraph 1 of the Charge in Case No. 72C-1136). The Hearing Examiner finds that the Charge, based upon the pleadings, was timely filed, and, therefore, the ground set forth in Paragraph 3 of the Respondent's Motion to Dismiss is hereby denied.

4. Paragraph 4 of the Respondent's Motion alleges that a copy of the Charges in Case No. 72C-1136 was not served on the Respondent within ten (10) days, in accordance with the Act, "in that said Complaint was filed on October 2, 1972, but was not served until October 13, 1972." This defense is also evidentiary in nature. However, the Hearing Examiner finds that service of the Charge under the Act is directory rather than jurisdictional or mandatory, and the grounds alleged must be denied unless a Respondent can show substantial prejudice resulting from untimely service. See *Local 1, I.A.T.S.E.* v. *Division of Human Rights,* 1 FEP Cases 850. Unless such a showing is made at the trial of this cause, the Hearing Examiner finds, for purposes of ruling on the Motion to Dismiss, that service of a Charge eleven (11) days rather than ten (10) days after filing is sufficient to apprise Respondent of the matter and accord Respondent full opportunity to prepare for the investigation without prejudice to Respondent. Accordingly, the Respondent's fourth defense is hereby denied.

5. Paragraph 5 of the Respondent's Motion alleges that the Complaint in Case No. 72C-1197 was neither timely issued nor timely served. Respondent claims that the Complaint was issued 182 days after the filing of the Charge, and served three days later. The Hearing Examiner finds that the provision in the Act requiring the issuance of a Complaint within 180 days following the filing of a Charge is not jurisdictional. See *In Re Glen Cove Municipal Civil Service Commission,* 2 FEP Cases 707, and *Local 1, I.A.T.S.E.* v. *Division of Human Rights, supra.* Accordingly, the defense raised in Paragraph 5 is hereby denied.

6. Paragraph 6 of the Respondent's Motion alleges that the Complaint in Case No. 72C-1136 was neither timely issued nor timely served, in that no valid extension of time was entered into since same was not approved by the Commission. Additionally, Respondent contends that service of the Complaint was not timely

since same was served beyond April 27, 1973. These matters are also evidentiary in nature. The Hearing Examiner finds that inasmuch as the parties entered into a stipulation extending the time, irrespective of formal approval by the Commission of such extension, Respondent is not prejudiced thereby. To hold a valid stipulation entered into by the parties void for want of a formal approval by the Commission is to defeat the conciliation, process as manifest in the statute. In addition, the service of the Complainant some three days after its issuance does not prejudice the Respondent. Morever, as was stated in Paragraph 5 above, these matters are not jurisdictional. Accordingly, for the foregoing reasons, the defense alleged in Paragraph 6 of the Respondent's Motion is hereby denied.

Inasmuch as the Hearing Examiner has denied the bases of the Respondent's Motion to Dismiss, said Motion to Dismiss is hereby denied.

DATED this 12th day of June, 1973.

/s/ Daniel S. Shulman
Daniel S. Shulman
Hearing Examiner

APPENDIX I

STATE OF ILLINOIS

FAIR EMPLOYMENT PRACTICES COMMISSION

IN THE MATTER OF TRUDY UNGER *Complainant,* AND SIRENA DIVISION OF CONSOLIDATED FOODS CORPORATION *Respondent.*	CHARGE NOS. 72 C—1136 72 C—1197

FINAL ORDER AND DECISION OF THE COMMISSION

In October, 1972, Complainant TRUDY UNGER filed two charges of unfair employment practices with the Commission against Respondent SIRENA DIVISION OF CONSOLIDATED FOODS CORPORATION. In Charge No. 72C-1136 Complainant, who was employed by Respondent as a sales representative alleged that she had been discriminated against because of her sex. She stated that Respondent had terminated her employment, replaced her with a man, then rehired her, but assigned her to a less desirable territory. Complainant also charged, No. 72C-1197, that she had been retaliated against in that subsequent to her charge of sex discrimination, she was threatened with a lawsuit and finally discharged by Respondent.

Subsequent investigation by the Commission disclosed substantial evidence to support these charges, whereupon

conciliation efforts were undertaken unsuccessfully, and a complaint was issued by the Commission on April 27, 1973. A public hearing was held before Daniel Shulman, Hearing Examiner, who made findings of fact and recommended that Complainant's charge of sex discrimination, No. 72C-1136, be dismissed, but that the charge of retaliation, No. 72C-1197, be sustained. The Recommended Order and Decision is now before us for review pursuant to Article VII, sec. 7.1 of the Rules and Regulations of Procedure under the Fair Employment Practices Act.

I. PROCEDURAL AND JURISDICTIONAL ISSUES

Prior to filing its answer Respondent moved to dismiss the complaint on the following grounds: (1) that Respondent does not employ twenty-five or more employees within the State of Illinois and therefore is not an employer as defined in Section 2(d) of the Fair Employment Practices Act, Ill. Rev. Stat., n. 48, sec. 852 (1971); that Complainant was not an employee as defined in Section 2(b) of the Act, but an independent contractor; (3) that Charge No. 72C-1136 was not timely filed, the discriminatory act having occurred more than 120 days prior to the filing of the charge; (4) that the Commission failed to serve notice of Charge No. 72C-1136 within ten days after the charge was filed, in contravention of section 8 of the Act; (5) that the complaint in Charge No. 72C-1197 was not timely issued and served, the complaint having been issued more than 180 days after the charge was filed, in violation of Section 8.01(a) of the Act; and (6) that, similarly, the complaint in No. 72C-1136 was not timely issued and served.

The motion was argued at pre-hearing conference before the Hearing Examiner, who denied Respondent's motion *in toto*. The Examiner ruled that the issues of whether Respondent employes more than twenty-five employees and whether Complainant was an "employee" as defined in the

Act were evidentiary in nature and should be the subject of evidence at the hearing.

With respect to Respondent's contention that Charge No. 72C-1136 was filed more than 120 days after the alleged discriminatory act, the Examiner ruled that the pleadings indicated that the alleged act occurred on July 31, 1972 and not, as Respondent contended, on May 31, 1972. Since the charge was filed on October 2, 1972, less than 120 days had elapsed.

Respondents three remaining grounds for dismissal all involved the Commission's failure to comply with time periods set forth in the statute. The Examiner determined that the ten day period within which notice of the charge must be served on the Respondent and the 180-day period within which the Commission must issue and serve the complaint are directory, rather than mandatory or jurisdictional, and that, in the absence of Respondent's showing of predjudice, the Commission cannot be divested of its jurisdiction.

II. EVIDENCE

After reviewing the record, we find that the Hearing Examiner's statement of the facts adduced at the hearing is comprehensive and without error. Accordingly, we adopt these findings of fact, set forth below, as not contrary to the manifest weight of the evidence.

A. Respondent

Respondent, SIRENA DIVISION OF CONSOLIDATED FOODS CORPORATION, is a manufacturer of women's swimwear. Its products are sold under the Sirena trade name to retail outlets by sales representatives who are assigned exclusive rights in various geographical territories. During the periods involved in this action, Complainant was the only female sales representative of the

Company. (TR. 307) However, three of the seven members of the Sirena Executive Board were women, and the Company also employed female sales personnel in its New York office. (TR. 307, 604, 605)

B. Complainant

Complainant, TRUDY UNGER, entered into a written contract with the Company in August, 1963. By the terms of this contract, Complainant agreed to act as sales representative for the Sirena line within a territory comprising Illinois, Indiana, Minnesota and Wisconsin. The Company agreed to pay Complainant a commission equal to 7% of the net sales within this territory. Complainant was responsible for all travel and selling expenses which she incurred. Further, Complainant was permitted to act as a sales representative for other non-competitive lines. (C. Ex. 2)

In the course of her business, Complainant maintained a bank account under the name "Trudy Unger & Associates" and filed an income tax return as a self-employed individual, operating the sole proprietorship of Trudy Unger Associates. (C. Ex. 47, 52) In 1965, Ohio was added to Complainant's territory. (TR. 49)

C. Sales Procedures

In order to sell the Company's products, Complainant would contact various retail outlets within her territory. In contacting these stores, Complainant operated relatively independently. She would set her own schedule, call on the customers she selected, and decide when and where to travel within the territory. She was directly responsible for all expenses which she incurred. (TR. 259, 260)

Complainant would make a report to the Company every week or two. These reports were made by telephone and,

until 1970, were directed to Arnold Seckler, the President of the Sirena Division. (TR. 62) In 1970, Maurice Newman was put in charge of all salesmen east of the Mississippi River, and Complainant, therefore, made her reports to him. (TR. 64, 261)

Further, various types of written communications would be sent between Complainant and the Company, including memoranda, periodic reports of commission earnings, and weekly reports of sales. (TR. 65-67) Complainant would also call the Company from time to time regarding such matters as shipping and deliver problems. (TR. 64, 65, 261)

Complainant received commissions on all sales that were made to stores within her territory. Sales could be made in any one of several ways. First, Complainant could write a sale while she was visiting a store within her territory. Second, customers who had been previously contacted by Complainant could call the New York or California showrooms and place their orders with Company personnel at these locations. (TR. 458, 893) Third, two or three times a year, the Company would pay for Complainant to go to New York and California. (TR. 65) While there, Complainant would see customers from her territory who had come to New York and California to place their orders. (TR. 459, 742, 743) Finally, Company personnel at New York and California showrooms would, on occasion, see Complainant's customers and take their orders for swimwear. (TR. 744, 965)

D. Complainant's Work Record

Between the years ending June 30, 1972, Complainant's annual net sales for Sirena increased over twenty-six times, from $20,620.00 to $572,016.00. (C. Ex. 64) During the same period, Company sales nation-wide increased nearly twelve times, from $383,241.00 to $4,528,826.00. (C. Ex. 65)

Company witnesses testified that during the last few years, there has been a shift in the Company's sales emphasis. The Company was now concentrating on making sales to large department stores, rather than small specialty shops. (TR. 525) There was testimony that Complainant had failed to adapt her sales techniques and procedures to adequately service the large department store account. (TR. 344-347) Newman testified that he talked to Complainant about the necessity for changing the way she wrote department store orders, (TR. 342), but that Complainant did not change her procedures. There was further testimony by Company witnesses that the Company was dissatisfied with Complainant's sales volume in her territory. It was asserted that the Company's competitors were doing better in the area. Finally, Complainant was allegedly criticized because the New York office was bearing too much of the burden of servicing Complainant's accounts. (TR. 470, 472, 540)

Criticisms directed against Complainant were not put in written form, and, in fact, the written memoranda up to 1972 often praised Complainant's performance. (TR. 280, 281, 344) (C. Ex. 13, 15, 16) Complainant denies that before May 23, 1972, she was criticized for these matters or that she was aware of any criticism about her sales performance. (TR. 70, 71, 976, 1056, 1057) Complainant states that the only Company projections of dollar sales volume applicable to her territory was contained in a note from Seckler in 1966 in which he stated that it was his belief that Complainant's "territory will yield $250,000.00 in a few years." (C. Ex. 15) Complainant's sales totals for the year ending June 30, 1969, was $339,498.00. (C. Ex. 64)

Finally, Complainant denies that she was criticized for over-using the New York office and denies that she did, in fact, use the facilities more than the other sales representatives. (TR 734, 893)

E. Company Reorganizes Sales Force

Starting in 1970, the Company undertook a reorganization of its sales force. During the next two and one-half years, six of the eight sales representatives, including Complainant, were terminated. The other five terminated sales representatives were men. During this period, eight new representatives were hired, as well as three new vice-presidents. In addition, two of the old territories were divided. (TR 473-489) (R. Ex. 2) The Company testified that the reorganization was motivated by the Company's desire to increase the volume of sales to large department stores. (TR. 485)

F. Termination of July 31, 1972

On May 23, 1972, Newman informed Complainant by phone that her services would no longer be required by the Company. (TR. 104) At this time, Newman also told Complainant that she was not performing her job adequately. (TR 104) Complainant testified that this was the first time that she had heard such criticism. (TR. 105) On June 5, 1972, Complainant received a letter dated May 30, 1972, which terminated Complainant's relationship with the Company as of July 31, 1972. (C. Ex. 6)

Following receipt of the termination letter, Complainant talked to Seckler and asked him to reconsider. (TR. 122) Late in June, Complainant talked to Newman and was told that a territory comprising Iowa, Kansas, Missouri, Nebraska and Illinois (excluding Chicago) was available. (TR 126, 550) Complainant expressed an interest in obtaining this territory. (TR. 129) The territory itself, as regards dollar volume, was much smaller than the one to which Complainant had previously been assigned. Complainant's old territory had a sales volume of over half a million dollars. (C. Ex. 64) In her discussions with Newman concerning the sales volume in the new territory, the

figure $250,000 was used. Newman stated this figure referred to the potential of the territory, while Complainant testified that the figure was represented to her as the current sales volume of this territory. (TR. 129, 561, 552) Complainant was also told that if she was assigned to this new territory, she would be covered by the Company's major medical plan and participate in the profit sharing program. (TR. 129, 130)

On June 30, 1972, Seckler wrote to Complainant and appointed her the sales representative for the 1973 season in the new territory. As in the past, Complainant was to receive full commission on all the sales made to customers in her territory. Further, she was again responsible for her selling expenses. The Complainant was still entitled to handle non-competing lines. The agreement was terminable upon thirty days written notice. (C. Ex. 22)

After receiving the appointment letter, Complainant called Seckler and asked why no mention was made of the major medical or profit sharing benefits. (TR. 132, 133) Seckler replied that it would be done. Newman subsequently told Complainant that in order for her to be entitled to these benefits, it would be necessary for her to be put on the payroll. (TR. 135, 136, 207)

After her termination on July 31, 1972, Complainant testified that she thought her original territory would be divided up among three salesmen. There had, in fact, been talk about dividing her territory in the past. (TR. 144, 525, 691-693) However, rather than divide the territory, most of Complainant's old territory was assigned to one salesman, John Anthony Herrman.

On August 21, 1972, the Company introduced its new line to the sales representatives at a meeting in California. (TR. 131, 1123) Company witnesses testified that following

the introduction of the new line, it was important for salesman to go out into the territory to get orders for the winter cruise seasons. In this regard, September sales were said to be important, since delivery of later orders could not be guaranteed by January, which is the peak of the cruise seasons. (TR. 573-584)

Complainant testified that in order to reduce her travel expenses, she had planned to contact the accounts in her territory closest to Chicago first. Later she would move to those that were farther away from Chicago. Further, Complainant states that she made plans to show her merchandise at the St. Louis and Chicago shows. Complainant states that Newman was aware of these arrangements and had not expressed any dissatisfaction. (TR. 158-162, 1123)

Newman, on the other hand, testified that during the month of September, he talked to Complainant several times about the necessity for getting out and traveling the territory, but that Complainant did not seem too interested in getting out and selling. (TR. 557, 570) Complainant did complain about her previous dismissal and the fact that her new territory was not as good as the old one. She told Newman that she needed other lines, and that she needed money to travel. (TR. 558) Respondent arranged to advance Complainant travel money of $350.00 per month. Further, Newman gave Complainant the names of three companies that she might call to obtain a second line, but Complainant made no serious effort to contact any of these companies. (TR. 556, 557)

On September 12th and 15th, Newman testified that he again talked to Complainant and urged her to start traveling. (TR. 571) Newman states that he pointed out to Complainant that she had not contacted some of the biggest stores in her territory. (TR. 572) Complainant responded

that she was only going to travel within a 50 to 75 mile radius of Chicago at first, and that she would not call on many of the stores until late October or November. (TR. 573) Newman told her that this would be too late to make delivery for the cruise season. (TR. 574, 575)

Newman testified that he talked to Mr. Earl Baird on September 13, 1972, about the possibility of becoming a sales representative for Complainant's territory. (TR. 585, 586, 667) (R. Ex. 13) Newman said that he had this conversation with Baird because he felt Complainant was not going to perform her duties. (TR. 586, 687)

In a later phone conversation between Newman and Complainant, Newman stated that he again told her that she would have to go out into the territory. Newman asserted that the Complainant was doing no better than her predecessor, who had been dismissed for poor performance. (TR. 363, 364) However, Complainant points out that as of October 13, 1972, her sales in the new territory were $21,062.00. The previous year, her predecessor had recorded sales during this period of $13,974.00 in a territory which was the same as Complainant's except that it did not include any part of Illinois. (C. Ex. 66) During this same period ending October 13, 1972, Herrman had recorded sales of $32,790.00 in a territory which was the same as Complainant's original territory, except that it excluded Illinois outside of Chicago. The previous year Complainant had recorded sales of $72,902.00 during this period. (C. Ex. 70) It is undisputed that at no time did Newman warn Complainant that she would be discharged if she did not go out into the territory. (TR. 362, 1123, 1124)

G. The October Termination

In September, 1972, Complainant testified that she became aware of information which indicated that the Re-

spondent had arranged for John Herrmann to replace her in her old territory much earlier than she had originally been told. (TR. 198) (C. Ex. 37) Thereafter, on October 2, 1972, Complainant filed a complaint in Case No. 72C-1136, alleging that the Company discriminated against her on the basis of sex when it took her old territory away from her and replaced her with Herrmann.

Also during this time, Complainant completed arrangements with another company, Belldoch-Popper, in which Complainant was appointed sales representative in a territory comprising Illinois, Wisconsin, northern Indiana and Michigan. (TR. 158, 234, 235) Under that Agreement, she was to receive a commission on all sales made in October and full territorial rights starting November 1, 1972. The Belldoch-Popper line was a non-competitive line. (TR. 288)

In the last week of September or the first week of October, Newman learned of Complainant's arrangement with Belldoch-Popper. He testified that he felt it confirmed his suspicion that Complainant was not interested in working the territory she had been assigned by Respondent. (TR. 591, 707) Newman testified that another sales representative had been terminated immediately when it become known that he had taken on a line in an adjacent territory. (TR. 596, 597)

Newman testified that by the first week in October, he had decided that Complainant would have to be replaced. (TR. 708, 709)

The Company received notification of the charge Complainant had filed in Case No. 72C-1136 on October 13, 1972. (TR. 592) On that same day, Newman called Complainant and asked her about the "suit" that she had filed. (TR. 593) Complainant told him that it was not a suit, but a complaint. (TR. 594) Newman testified that during

this conversation, he again stressed the necessity for having Complainant travel the territory, and stated that she wasn't fulfilling her obligations. Complainant testified that during the conversation, Newman stated that "anybody who is suing a company can't be working for the company at the same time," and suggested that Complainant resign. (TR. 165) Complainant then said that she could not talk further because a customer was in the office, and Newman told her that if she did not call back by 2:30 that afternoon, he would consider it her resignation. (TR. 167, 594)

Newman testified that he talked to Complainant a second time on the 13th, and that during that conversation, he again expressed displeasure with Complainant's performance, and particularly with the fact that she had taken an adjacent territory for the Belldoch-Popper Company. (TR. 595) Complainant states that she did not talk to Newman again that day, but reached him on Monday, the 16th, and informed him that she did not intend to resign. (TR. 167) Newman then informed Complainant that she was being terminated. (TR. 169, 598) Later that day, Complainant testified that she talked to Seckler. Complainant testified that during this conversation, Seckler questioned Complainant about the complaint she filed with the Commission. (TR. 173, 174) He advised her against taking this step and said that it would cost her money in lawyer's fees. Seckler tried to persuade Complainant to drop her complaint. Complainant stated that he also threatened legal action on the part of the Company against Complainant for her falure to live up to her responsibilities under the Sales Representation Agreement. (TR. 174)

Complainant stated that she told Seckler that the reason that she filed a complaint was because she had previously been told that she was going to be replaced by three sales representatives, and, in fact, only one man had replaced

her. (TR. 176) Seckler denied that there had been any unfairness to Complainant and stated that "we knew what your sex was for ten years." (TR. 176)

Later that day, Seckler wrote to Complainant and informed her that she had been terminated. The reason stated for the termination was her failure to make a trip to the Kansas, Nebraska, Missouri and Iowa territories with the 1973 line. Complainant was told to return her samples immediately to New York. (C. Ex. 27) Shortly thereafter, Complainant filed her second charge alleging retaliation as the cause of this second termination.

III. HEARING EXAMINER'S DECISION

A. Charge No. 72C-1136

In its post-hearing brief, Respondent had raised the issue of whether Complainant's initial charge was timely filed. Respondent argued that the charge should have been filed within 120 days after May 31, 1972, the date on which Complainant learned that she would be terminated. In his decision, the Examiner found that the applicable 120-day period did not begin to run until July 31, 1972, the effective date of the termination. (Although Respondent did not subsequently raise this issue, it should be noted that effective October 1, 1972, this limitation period in the statute was amended to provide that the charge must be filed within 180-days following the alleged discriminatory act. Thus, the 120-day period does not apply.)

A second issue raised by Respondent, concerning whether Complainant was an employer within the meaning of the definition in Section 2(c) of the Act, was not decided by the Hearing Examiner because he recommended that this charge be dismissed. The Hearing Examiner determined that Complainant had not sustained her burden of proving

by a preponderance of the evidence that she had been discriminated against because of her sex. The Examiner found that (1) Complainant was not treated any differently from the five male sales representatives who were terminated during Respondent's staff reorganization; (2) she was the only sales representative to be given a new territory after she was terminated; (3) she replaced a man in the new territory to which she was assigned; (4) the memoranda written by certain Respondent's employees, several of whom were women, contained references to her sex but do not support an inference of discrimination; and (5) the fact that Complainant was the only female sales representative does not indicate that she was terminated because of her sex.

B. Charge No. 72C-1197

Since the Hearing Examiner had found that the first charge was timely filed, he rejected Respondent's contention that the second charge must because the first charge was not filed within the statutory time period. The Hearing Examiner also ruled that the 180-day period within which the complaint must be issued and served following the filing of a charge is directory, and not mandatory or jurisdictional.

In addition, the Examiner determined that Complainant was an employee within the meaning of Section 2(c) of the Act, and not an independent agent because (1) after Complainant's relocation, she was put on Respondent's payroll and deductions were made from her paychecks; (2) she was promised coverage under Respondent's major medical and profit-sharing plans; and (3) Respondent alleged that she was terminated for her failure to obey company directives to travel in her new territory, indicating that Respondent considered her to be under its direction and control as an employee. The Hearing Examiner noted that a

finding that Complainant was an independent agent prior to the original termination would not affect the validity of the second charge because Section 3(d) of the Act proscribes retaliation against *any person* who in good faith has filed a charge with the Commission.

Regarding the merits of Charge No. 72C-1197, the Hearing Examiner concluded that Respondent had terminated Complainant on October 13, 1972 in retaliation for the charge of discrimination that she had filed. Respondent had contended that Complainant was discharged for valid business reasons. The Hearing Examiner reached his conclusion in light of his findings which were as follows:

> (1) Complainant failed to travel in her new territory despite repeated requests by Respondent's officials that she visit her customers before it was too late to take orders for the "cruise" season;
>
> (2) Complainant represented a non-competing line in a territory adjacent to the territory assigned to her by Respondent which Respondent claimed would impair ability to handle the territory it assigned her;
>
> (3) When other sales representatives had taken on lines in adjacent territories they were immediately terminated;
>
> (4) Respondent did not warn Complainant that her actions could result in her termination;
>
> (5) Complainant was not terminated immediately after she took on the line in an adjacent territory, but was terminated two weeks later, after she filed her original charge of discrimination;
>
> (6) On the day Respondent became aware of the charge, Newman suggested that Complainant resign and told her that if she did not return his call by a specific time, he would consider that she was terminated;

(7) Respondent's President, Seckler, advised Complainant to drop her charge and threatened to file suit against her as a result of which she would incur substantial legal expense;

(8) Immediately after these conversations Respondent sent a letter to Complainant terminating her relationship as a sales representative.

Accordingly, it was recommended that an order be entered as follows:

(1) That Respondent re-employ Complainant as a sales representative for the territory of Missouri, Iowa, Kansas, Nebraska, and Illinois (excluding Chicago);

(2) That Respondent pay to Complainant an amount of money equal to income lost from the date she was wrongly discharged, October 16, 1972, until she is restored to her former position. Such pay should be computed on the basis of Complainant's commission rate for the actual sales attributed to the territory, less any amounts that Complainant earned through the sale of competing lines or through other types of employment. The amount Complainant earned through her work with Belldoch-Popper should not be set off against the amount of back pay to which she may be entitled.

IV. CONTENTIONS OF THE PARTIES ON REVIEW

A. Complainant

Complainant filed a Petition for Review asking that the Commission reject the Hearing Examiner's finding that Complainant's original termination did not involve sex discrimination. Complainant cited numerous facts in the record that she claimed would support a finding of discrimination. Complainant also argued that prior to her original termination she was an employee within the meaning of the FEP Act because the Act defines an employee as a person who provides services for remuneration, and that her duties before and after she was put on the payroll were exactly the same.

B. Respondent

Respondent's Rejoinder urged that the Hearing Examiner's conclusions in regard to Complainant's charge of retaliation were unsupported by the evidence; Respondent contended that the record supported the conclusion that Complainant was terminated because she refused to travel in her new territory.

Respondent also argued that Complainant was an independent contractor at all times when she acted as a sales representative. In addition, Respondent renewed their contention that the untimely issuance and service of the complaint nullified the Commission's jurisdiction.

Finally, Respondent maintained that the Hearing Examiner's Recommended Order was incorrect. Respondent assigned error to the Hearing Examiner's failure to provide for a deduction of Complainant's operating expenses from her earnings and his failure to consider Complainant's earnings from the Belldoch-Popper line.

V. DECISION

Respondent had raised a variety of procedural and jurisdictional issues prior to the filing of its Rejoinder to Complainant's Petition for Review. However, in its Rejoinder Respondent has failed to renew some of these issues. We will address only those issues raised by Respondent in its Rejoinder and during oral arguments before the Commission.

A. Complainant's Status as an Employee

The Hearing Examiner declined to decide whether Complainant was an employee with respect to Charge No. 72C-1136 because he found that there was no discrimination involved. He did conclude that Complainant was an employee with respect to the retaliation charge No. 72C-1197. We

find that Complainant was an employee within the meaning of Section 2(c) of the Statute at all time relevant to the discriminatory acts alleged.

The question of whether a person is an employee or an independent contractor is generally answered by posing a second question: whether there is control by the "employer" over the manner and method of the work performed. Where there is such control, an employer-employee relation exists. *See Darner v. Colby,* 375 Ill. 558 (1941). Under this rule, Complainant should be considered an employee because Respondent has averred that she was terminated on July 31, 1972 as a result of her failure to respond to company directives concerning her sales methods.

The FEP Act defines "employee" very broadly, in Section 2(c), to include "any individual performing services for remuneration within this State for an employer . . ." This definition would appear to cover independent contractors well as "employees" in the strict sense of the work. And, in fact, the Act does not specifically require that a person be an employee to be entitled to its protection. Section 3 provides that "it is an unfair employment practice: (a) For an employer, because of the . . . sex . . . of an *individual* to refuse to hire, to segregate, or otherwise discriminate against such *individual* with respect to hire, . . . tenure, terms or conditions of employment. (emphasis added)."

Finally, it is clearly not necessary that a strict employer/employee relationship exist for a person to be entitled to protection under Section 3(d) of the Act which prohibits retaliation. Section 3(d) protects "any person" from retaliation, and does not require employee status.

B. Timeliness of the Complaint

Respondent takes the position that, because the Complaint was issued and served more than 180 days after

Charge No. 72C-1197 was filed the Commission is without jurisdiction to maintain proceedings based thereon. The Hearing Examiner properly ruled that the 180-day period is merely directory and therefore the Commission has not been divested of jurisdiction.

In administrative proceedings strict pleading and practice rules are not required. E.g., *Gigger* v. *Board of Fire and Police Commissioners,* 23 Ill. App. 2d 433; *Liquid Carbonic Co.* v. *Industrial Commission,* 352 Ill. 405. Further, strict compliance with statutory procedure rules is not always considered indispensable to the validity of acts done under them. *People ex rel Agnew v. Graham,* 267 Ill. 426, 437. This principle has been reaffirmed by Illinois courts in all situations, except those where non-observance of the statute has caused prejudice to a person whom the statute is designed to protect. *Carrigan v. Liquor Control Commission,* 19 Ill. 2d 230. And recent, the Illinois Appellate Court has specifically held that the Commission's failure to comply with the 180-day period in Section 8.01 of the FEP Act cannot deprive an aggrieved party of his rights under the statute:

> "If there is a jurisdictional statute of limitations in proceedings before the Commission, it should be the time period that runs between the act complained of and the date on which the charges are filed before the Commission by the person. To hold that an aggrieved party who timely files his charges with the Commission with regard to discrimination of employment will be barred from a remedy simply because the Commission fails to act timely with regard to his charges is tantamount to throwing the employed citizenry of this state to the wolves of bureaucratic indifference. The Commission was created to protect the fundamental and substantial employment rights of the citizenry with regard to non-discriminatory opportunity in employment. The Commission and the laws which created the laws of the Commission did not contemplate that the

Commission's administrative errors would (or could) prejudice such substantial statutory rights. Certainly there is nothing in the 1967 statute to suggest that the rights of aggrieved party, once he has filed his charge with the Commission, can be forfeited by the Commission's failure to take action. Appellants' counsel correctly states the general rule that where a statute proscribes a time within which a public officer is to perform official acts affecting the rights of others, the time proscribed is to be considered directory unless from the nature of the act the designation of time must be considered a limitation on the power of the officer. *Whalin* v. *City of Macomb*, (1875), 76 Ill. 49." *Moss-American Inc.* v. *Fair Employment Practices Commission*, Ill. App. 3d (1974).

C. Charge No. 72C-1136

Turning to the merits of this part of the case, we find that the Hearing Examiner's decision is not contrary to the manifest weight of the evidence. It was incumbent upon Complainant to show that her termination, replacement with a man, and subsequent re-instatement and re-assignment to a less profitable sales territory was because of her sex. We believe that the Hearing Examiner correctly found that the evidence failed to support these allegations.

It is significant that Complainant was just one of six of Respondent's sales representatives who were terminated as a result of a division-wide reorganization; all of the others were men. It is also significant that of all the persons terminated during the sales reorganization, only Complainant was rehired. We cannot conclude that Complainant was assigned to a different territory, which she claims had less profit potential, because of her sex in light of the fact that the boundaries of the sales territories were changed. This merely reflects the reorganization of the entire sales division. In fact, Complainant replaced a man in the new territory.

None of Respondent's actions towards Complainant with respect to her termination, re-instatement and re-assignment are shown by the evidence to have been discriminatory. Rather, it would appear that Complainant was given greater consideration than the male sales representatives who were terminated as a result of the division reorganization. It may be true, as Complainant argues, that her termination and re-assignment were not fully justified by her record with Respondent. The question to be determined under the Fair Employment Practices Act, however, is not simply whether the actions taken with respect to Complainant were severe or even drastic, but rather whether she was treated more harshly than male sales representatives similarly situated. The Hearing Examiner resolved this latter question in the negative, and we hold that his finding is not contrary to the manifest weight of the evidence.

D. Charge No. 72C-1197

Regarding the merits of Complainant's charge of retaliation, there is evidence to support Complainant's contentions. As the Hearing Examiner found, when Respondent became aware that Complainant had filed a charge of unfair employment practices (No. 72C-1136), Newman called Complainant, questioned her about the charge, and suggested that she resign. Later, when Complainant talked to Seckler, he too questioned her about the charge and advised her to drop the whole matter. He also threatened to sue Complainant. That same day, he wrote to Complainant stating that she was terminated. These facts, standing alone would indicate that her second termination constituted a reprisal for her previous charge, in violation of Section 3(d) of the Act.

However, Respondent contends that the totality of the evidence shows that Complainant's final termination was

based on other, valid business reasons. We must decide whether the evidence establishes legitimate, non-discriminatory reason for the termination.

The record indicates that during September, 1972, Complainant failed to arrange personal sales appointments in the new territory to which she had been assigned. At about this same time, Complainant had also entered into an agreement with another company to sell its product in another territory adjacent to the one to which she had been assigned by Sirena. According to Respondent, this was grounds for her immediate termination.

We conclude that these facts constitute legitimate, non-discriminatory reasons for Complainant's termination in October, 1972. We are not unmindful of the timing and events leading to the termination that the Hearing Examiner relied upon in finding a retaliatory discharge. However, these events must be viewed in the context of the other evidence showing that Respondent had valid reasons for terminating Complainant. As stated earlier, Complainant was not discriminated against when she was assigned to the new sales territory. As such, she was obliged to carry out her sales duties in the new territory according to the terms of her employment. The record establishes that she did not do so, even after repeated reminders.

The Hearing Examiner found that Respondent had valid reasons for terminating Complainant immediately after she took on the second line in another territory. He found it significant, however, that she was not in fact terminated until some two weeks later after Respondent learned that she had filed her initial charge. As we have said, this sequence of events in an ordinary case would certainly suggest retaliation. In this case, however, the evidence establishes that Respondent's officers were in regular con-

tact with Complainant during the time exhorting her to drop her other assignment and to begin to travel and contact accounts for Sirena. The record also indicates that these exhortations did not elicit a favorable response from Complainant, and that time was drawing short for cruise season sales. Under these circumstances, we conclude that Complainant was subject to imminent termination. To hold in this context that the termination became retaliatory when Respondent learned of Complainant's charge, would be tantamount to advising employers in future cases to discharge employees immediately when grounds become apparent before they are precluded by the filing of an intervening charge. Thus, in the context of this case we find that the Examiner's conclusion in No. 72C-1197 is contrary to the manifest weight of the evidence, and we reverse.

VI. ORDER

In view of the foregoing it is HEREBY ORDERED that the Complaint of TRUDY UNGER, against SIRENA DIVISION CONSOLIDATED FOODS CORPORATION, Charge Nos. 72C-1136, 72C-1197, be and hereby is DISMISSED.

Entered this 20th day of February, 1975.

FAIR EMPLOYMENT PRACTICES COMMISSION

BY:

Susan Bezucha, Acting Chairperson
Thomas G. McCracken, Commissioner
Wallace L. Heil, Commissioner
Alfred C. Whitley, Commissioner

APPENDIX J

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT, LAW DIVISION

SIRENA DIVISION OF CONSOLIDATED FOODS CORPORATION and ILLINOIS FAIR EMPLOYMENT PRACTICES COMMISSION

TRUDY UNGER

General No. 75 L 5448

ORDER

This cause coming on for hearing on the Complaint of Trudy Unger for Administrative Review of the decision of the Illinois Fair Employment Practices Commission in Charge No. 72 C 1136 for discriminatory discharge and Charge No. 72 C 1197 for retaliatory discharge against Sirena Division of Consolidated Foods Corporation and the Court having considered the record before the Commission and the evidence offered therein by Complainant and Respondent and the court having considered the arguments and briefs of counsel and all parties being represented in open court by their respective counsel;

NOW THEREFORE, the court finds that the decisions and orders of the Fair Employment Practices Commission in the aforesaid Charge Nos. 72 C 1136 and 72 C 1197 are each against the manifest weight of the evidence;

IT IS THEREFORE ORDERED, AJUDGED AND DECREED that Judgment is rendered herein on the issues in favor of Trudy Unger and against Sirena Division of Consolidated Foods Corporation for discriminatory discharge in Case No. 72 C 1136 and for retaliatory discharge in Case No. 72 C 1197, both contrary to the Illinois Fair Employment Practices Act;

IT IS FURTHER ORDERED that judgment be and is hereby rendered for Complainant Trudy Unger and against Respondent Sirena Division of Consolidated Foods Corporation; that Respondent is ordered to cease and desist from the unfair employment practices complained of in these charges; that Respondent is ordered to reemploy Complainant as Sales Representative; and that Respondent pay to Complainant back pay in an amount equal to all sums, including fringe benefits where appropriate, she would have earned as Sales Representative from the aforesaid discharges to date, less any interim earnings or unemployment compensation received, plus interest on said sum at six percent (6%) per annum.

Dated: September 10, 1976

Enter: Judge Raymond K. Berg
Judge

APPENDIX K

IN THE

APPELLATE COURT, STATE OF ILLINOIS

FIRST DISTRICT

No. 76-1634.

TRUDY UNGER,

Plaintiff-Appellee,

v.

SIRENA DIVISION OF CONSOLIDATED FOODS CORPORATION and Illinois Fair Employment Practices Commission,

Defendants-Appellants.

McNAMARA, Justice:

This matter arises from two charges against defendant Sirena Division filed by plaintiff Trudy Unger with the Illinois Fair Employment Practices Commission. In the first charge plaintiff alleged that her termination by Sirena in May 1972 was due to sex discrimination. In the second charge plaintiff alleged that after she was rehired by Sirena and assigned to a new territory, she was discharged in October 1972 in retaliation for filing the initial charge with the commission. Hearings were held before a hearing examiner who submitted a recommended decision to the commission. The examiner recommended dismissal of the first charge, but found the second discharge was a retaliatory measure. After hearing arguments, the commission ordered dismissal of both charges. Plaintiff brought an action in the circuit court, and the court held that the commission's findings were against the manifest weight of the evidence. Sirena appeals. It contends that plaintiff was an independent contractor not covered by the Illinois Fair Employment Practices Act (Ill.Rev.Stat.1975, ch. 48, sec. 851 et seq.); that the trial court erred in reversing the commission's

finding that plaintiff's original discharge in May 1972 was not sexually discriminatory; and that the commission correctly found that plaintiff's second discharge in October 1972 was not a retaliatory measure.

The facts underlying this dispute are as follows. Sirena is engaged in the manufacture, distribution and sale of women's swimwear. Its merchandise is sold to retail stores by independent sales representatives who have exclusive rights to sell the Sirena line within various geographical territories. From August 1963 until May 1972, plaintiff was employed as Sirena's sales representative for the territory comprised of Michigan, Illinois, Indiana, Minnesota, Wisconsin and Ohio.

Plaintiff was hired by letter agreement in August 1963. Under this agreement plaintiff was an "independent agent" responsible for all travel and other selling expenses, taxes, and licenses. She was free to set her own schedule and to call upon customers she selected, and she was to pay for expenses she incurred. She was not required to account to Sirena for her daily activities. Plaintiff could carry non-competitive lines and the agreement acknowledged that she had such lines at that time.

Plaintiff's contact with Sirena was through orders placed and weekly telephone conversations regarding business operations such as shipping and delivery problems. According to plaintiff, she discontinued representing other lines in 1969 or 1970. At that time she approached Arnold Seckler, president of Sirena, and vice-president Maurice Newman to discuss the possibility of becoming an exclusive sales representative for Sirena. As such, her status would change to that of a salaried employee and she would be eligible for hospitalization and other benefits. Sirena never granted that request but, as of August 1969, paid plaintiff $100 each month to reimburse her for expenses incurred in maintain-

ing a Chicago showroom. Plaintiff continued to receive a seven percent commission of the gross sales on all business booked by Sirena or its agents in her territory. In addition, she received a 3.5 percent commission on the sale of close-out merchandise.

During the period she was engaged as a sales representative for that territory, plaintiff's dollar volume of sales increased from $22,000 to $572,000. Her percentage of the total company business increased from 6.3 percent in 1963 to 12.5 percent in her final year. Throughout this time, plaintiff was Sirena's only female sales representative.

From 1963 to 1972, Sirena's national sales grew from approximately $350,000 to over $4,700,000. In accordance with its growth, Sirena developed marketing strategies to meet its competitors and to increase its sales volume. At the commencement of the 1970-71 sales season, Seckler and Newman developed a plan to reorganize the sales force. During the course of the reorganization, Sirena hired a new vice-president to strengthen sales and terminated six of its eleven sales representatives. Plaintiff was among those terminated. According to Newman, the reorganization was designed solely to accomplish a shift in marketing emphasis away from small specialty shops to large department stores. His decision to terminate those six sales representatives was based upon their inability to handle their respective territories and to service the larger accounts.

Newman testified that starting in 1970 he attempted to correct plaintiff's method of writing department store orders, but she failed to improve. In January 1971, and on other occasions, Seckler and he met with plaintiff to try to correct her short-comings and to stress the importance of department store sales. In November 1971, he made a trip to Chicago to evaluate plaintiff and to urge the importance of placing a concerted effort on department store sales.

Plaintiff did not change the manner in which she worked with department stores.

In 1971 Seckler told plaintiff that her overall performance was unsatisfactory. Her territory accounted for more than 22 percent of the buying power in the country and sales of Sirena's competitors in her territory were far better. At that time, Newman told plaintiff that too great a burden of servicing midwest accounts was falling on the New York office. He testified his records showed that plaintiff utilized the New York office more than other representatives. According to Newman, such undue reliance was also a reason for the termination of two other sales representatives.

In a letter dated May 31, 1972, plaintiff was advised of her discharge effective July 31, 1972. The reason given was that "... due to the growth that has occurred in Sirena nationally and due to the necessity of fueling our continued plant expansion, it has become necessary to both strengthen and reorganize our sales staff."

In June 1972, plaintiff asked Seckler to reconsider the decision. Later that month plaintiff was offered the position as sales representative for the territory of Iowa, Missouri, Kansas, Nebraska, and Illinois (except Chicago). The former sales representative had been terminated because he was not doing an adequate job. After Seckler offered plaintiff the position, she called Newman and accepted. She told Newman that she wished to become a part of the organization again. On June 30, 1972, the parties entered into a written agreement whereby plaintiff was appointed sales representative for the new territory. Under the agreement, plaintiff was given exclusive rights in the territory, a seven percent commission, and the right to carry noncompetitive lines.

At the hearing, plaintiff introduced letters which Seckler had written in 1963, 1964, and 1966. Seckler wrote to advise plaintiff of the importance of her territory and the role which she was to play in bringing the territory into prominence. Seckler expressed his confidence in plaintiff's ability and told her he hoped that her territory's yield would improve. Plaintiff also introduced a letter from Seckler dated June 30, 1972, in which he told plaintiff that he was glad to have her "back on board."

According to Newman, the Sirena sales season commences September 1 when sample lines are sent to each sales representative. The first month of the sales season is critical because Sirena ordinarily books 30 to 35 percent of its annual sales at that time. In order for retail stores to have their merchandise in time for the winter cruise season, the orders must be obtained at the beginning of the season. Newman testified that early sales assist in obtaining subsequent sales throughout the year because most department stores plan their annual business during the cruise season. In addition, Sirena uses early sales to determine what styles will be profitable during the rest of the year.

On September 8, 1972, Newman telephoned plaintiff to advise her that all other sales representatives were on the road and to urge her to begin selling in her territory. On September 12 he again told plaintiff that it was imperative that she start traveling since she was the only sales representative who had not begun to travel. Newman told her concentrate on department store sales and he expressed concern about two stores. Plaintiff said that she would only travel within a 50-75 mile radius of Chicago at first and did not plan to call on stores in several states until late October and November. Newman replied that such a schedule would be too late to make delivery dates for the cruise season.

Newman thereafter telephoned plaintiff and advised her that she was not performing any better than her predecessor who had been discharged. Plaintiff stated that she was running the territory in the way she wished. Newman told her she was running it contrary to industry principles and that she had not yet called on the three stores which accounted for a large percentage of her projected volume.

Plaintiff testified that during the six weeks following her receipt of Sirena samples, she programmed her work so as to cover accounts within the 50-100 miles radius of Chicago. She did this to conserve on travel expenses and to arrange to carry a line with Beldock-Popper in her former territory. Plaintiff did not travel in her territory prior to her discharge in October. She testified that she planned to attend a show in St. Louis in October and one in Chicago in November. She planned to cover her territory later in the season because she did not believe cruise season orders to be too important. In plaintiff's opinion sales made to some of the department stores in her territory also were not too important.

Plaintiff introduced two memoranda sent to her by Janet Tolsky of Sirena's home office. They contained information concerning the commission balance owed plaintiff and a personal message encouraging plaintiff. Plaintiff also introduced into evidence a letter from Dolores Tessendorf, an executive secretary at Sirena. The letter, dated June 20, 1972, congratulated plaintiff on still being with Sirena, and added: "Maybe it's not *JUST* a man's world after all."

According to Sirena's records, plaintiff's sales in her new territory for the period ending October 13, 1972, amounted to $21,062. This figure exceeded the preceding year's sales by more than $7,000.

On October 2, 1972, plaintiff filed a complaint with the commission alleging that her discharge as sales representa-

tive for the first territory had been discriminatory. Newman testified that he learned of this on October 13, 1972 when his secretary told him the company had received some papers concerning a lawsuit. Newman discussed the complaint with plaintiff on the telephone and asked, since she was still with Sirena, why she had filed suit. Newman told plaintiff that he had been interviewing people to replace her as sales representative. He said he thought plaintiff should resign because things were not working out in her territory and he did not understand why she would want to sue and still work for Sirena.

On October 16, 1972, Seckler telephoned plaintiff to discuss the charge she had filed and told her he thought she was ill-advised to file the charge and that litigation would be costly. On the same day he wrote plaintiff terminating her appointment as a sales representative for Sirena. On October 26, 1976, plaintiff filed a second charge of unfair employment practice with the commission. In her complaint plaintiff alleged that her discharge on October 16 was a retaliatory discharge in violation of the statute. (Ill.Rev. Stat.1971, ch. 48, par. 853(d).)

We initially and succinctly address the issue of whether plaintiff was an employee entitled to coverage under the FEPA. The definition of employee in the FEPA is broad, and the exclusions set out are narrow ones. We agree with the holding of the commission that plaintiff was an employee of Sirena and, therefore, within the ambit of the FEPA.

Sirena next contends that the trial court erred when it reversed the commission's finding that plaintiff's first discharge in May 1972 was not the result of sexual discrimination. Under the FEPA, the commission must determine whether discrimination occurred based upon the preponderance of the evidence. (Ill.Rev.Stat.1971, ch. 48, par. 858(f).)

In reviewing the commission's action, the court must decide whether the agency's determination is against the manifest weight of the evidence. (*General Electric Co.* v. *Illinois Fair Employment Practices Co.* (1976), 38 Ill.App.3d 967, 349 N.E.2d 553.) Upon review of the dismissal of a charge by the commission, the proper scope of review is to ascertain from an adequate record whether the commission's order of dismissal is arbitrary, capricious, or an abuse of discretion. (See *Klein* v. *Illinois Fair Employment Practices Com.* (1975), 31 Ill.App.3d 473, 334 N.E.2d 370.) The commission fund it significant that plaintiff was one of six sales representatives terminated as a result of a division-wide reorganization. All of the other representatives were men. The commission noted that of all the persons discharged, only plaintiff was rehired. Because the boundaries of the sales territories were changed during the reorganization, the commission discounted plaintiff's assertion that she was assigned to a different territory with less profit potential because of her sex, and it observed that plaintiff replaced a male sales representative in the new territory.

Based on the foregoing evidence, the commission concluded that none of Sirena's actions towards plaintiff with regard to her May 1972 discharge were shown by the evidence to have been discriminatory. The commission rejected plaintiff's contention that her termination and reassignment were not fully justified by her record with Sirena. We agree with the commission that the question to be determined is whether she was treated differently than male sales representatives similarly situated. (See *McDonnell Douglas Corp.* v. *Green* (1973), 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668; *A. P. Green Services Division of Bigelow-Liptak Corp* v. *Illinois Fair Employment Practices Com.* (1974), 19 Ill.App.3d 875, 312 N.E.2d 314). We hold that the commission's findings are amply supported by the rec-

ord and are not contrary to the manifest weight of the evidence.

We also must consider whether the commission's finding that plaintiff's second discharge in October 1972 was for legitimate reasons rather than in retaliation was proper. Plaintiff first argues that the commission lacked jurisdiction to consider this issue because her petition for review addressed only the question of her first discharge and Sirena did not seek review on the issue of whether a retaliatory discharge occurred. Under the FEPA, all matters raised in the record before the hearing examiner are properly before the commission. (Ill.Rev.Stat.1975, ch. 48, par. 858.02(c).) Therefore, the commission possessed jurisdiction to consider and rule on plaintiff's second charge.

Under FEPA, it is an unfair employment practice:

> "For any employer * * * to discriminate against any person because he or she, reasonably and in good faith, has opposed any practice forbidden in this Act, or because he or she, reasonably and in good faith, has made a charge, testified or assisted in any investigation, proceeding or hearing under this Act * * *." Ill.Rev.Stat.1975, ch. 48, par. 853(d).

The hearing examiner made the following findings with respect to the second charge filed by plaintiff. Plaintiff failed to travel in her new territory despite repeated requests by Newman and Seckler that she call upon customers before it was too late to fill orders for the cruise season. Plaintiff represented a noncompeting line in an adjacent territory and Sirena maintained that such would impair her ability to handle the territory assigned to her. Other sales representatives for Sirena had taken on lines in adjacent territories and were terminated immediately. Plaintiff, however, was not told that acceptance of the line would result in termination. Plaintiff was terminated two weeks after

she assumed the Belldock-Popper line and after she filed her original discrimination charge. On the day Sirena became aware defendant had filed a charge, Newman suggested she resign. Newman told plaintiff that if she did not return his call by a specific time, he would consider her discharged. Three days later Seckler called plaintiff, advised her to drop her charge, and threatened to file suit. Immediately after he talked to plaintiff, Seckler wrote terminating her appointment as sales representative.

Under FEPA, "[T]he commission shall review the record and may adopt, modify or reverse in whole or in part the findings and recommendations of the hearing examiner. The commission shall adopt the hearing examiner's findings of fact if they are not contrary to the manifest weight of the evidence." (Ill.Rev.Stat.1975, ch. 48, par. 858.02(d).) In its order the commission adopted the hearing examiner's findings of fact as set out above, but rejected his recommendation to sustain the retaliation charge. We agree with the commission's ruling.

The commission determined that for some time prior to plaintiff's second discharge by Sirena, Newman and Seckler had been in regular contact with her. During that time they exhorted her to concentrate on selling Sirena merchandise and to commence traveling in her new territory. The undisputed evidence is that plaintiff ignored these directives.

Plaintiff was obligated to carry out her sales duties in the new territory according to the terms of her employment. Since 1970 Newman and Seckler had attempted to correct plaintiff's sales methods. Plaintiff admitted that she did not change her approach and continued to service her territories in the manner she believed best. In September 1972, Newman complained to plaintiff about her inaction and warned her of the consequences if she did not put forth

a better effort. Plaintiff did not respond to those warnings, and conceded that she did not travel in her territory prior to her termination. She offered as an explanation only her belief that certain practices were not important. She also testified that during her second employment she was concerned with obtaining a noncompetitor's line in her old territory. Plaintiff's conduct toward Sirena was insolent and insubordinate. The record as reflected both by the examiner's findings and plaintiff's own testimony disclosed overwhelming support for Sirena's decision to terminate her employment and for the commission's determination that the termination was not retaliation.

Plaintiff has pointed out that she was Sirena's only female sales representative and that she was replaced by a single interviewee, a man. We do not perceive how that fact reveals any retaliation. Moreover, the record shows that her predecessor, a male, was discharged because of inadequate performance. Importantly, her replacement was interviewed weeks before plaintiff filed any charge of discrimination. It is undisputed that plaintiff's difficulties in employment long predated her second discharge. In considering a charge of this type, the timing of events is only one element which would show discrimination. As the commission noted in its order, to hold in the context of this case that the termination became retaliatory when Sirena learned of plaintiff's discriminatory charge would be tantamount to advising employers to discharge employees immediately when grounds become apparent before they are precluded by the filing of an intervening charge. If defendant proves valid reasons for the discharge, plaintiff must then demonstrate that the assigned reasons were a pretext or discriminatorily applied. (*McDonnell Douglas Corp.* v. *Green* (1973), 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668.) In the present case, plaintiff failed to so

demonstrate. The commission correctly reversed the recommendation of the hearing examiner as to the October discharge. We believe the trial court erred in reversing the commission's ruling.

For the reasons stated, the judgment of the circuit court of Cook County is reversed.

Judgment reversed.

JIGANTI, P. J. and SIMON, J., concur.

APPENDIX L

CONSTITUTION
of the
UNITED STATES OF AMERICA

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, without due process of law; nor shall private property be taken for public use, without just compensation.

TITLE VII, CIVIL RIGHTS ACT OF 1964, §706(b), 706(c), 706(e), 706(f)(1), 706(f)(3), 42 U.S.C. §§ 2000(e)-5(b)(c), (f)(1), (f)(3). In Pertinent Part.

"(b) Whenever a charge is filed by or on behalf a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission

requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of the section. . . ."

"(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law . . ."

"(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings

with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency."

"(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge . . . If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was ag-

grieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

". . .

"(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States sha'l have jursidiction of actions brought under this subchapter . . ."